Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's two-tiered approach to analyzing state economic regulation under the Commerce Clause, a state law that is found to discriminate against interstate commerce is generally struck down without further inquiry, while a state law that "regulates evenhandedly" and has "only incidental" effects on interstate commerce is invalid if, on balance, it imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The question presented in this case is:

> Whether the second-tier "balancing test" of *Pike v. Bruce Church* requires a threshold showing that the state law places a "discriminatory" or "disparate" burden on interstate commerce.

The Second, Third and Seventh Circuits have answered the question in the affirmative; the Fifth, Sixth, Eighth, and Tenth Circuits in the negative.

CORPORATE DISCLOSURE STATEMENT

The National Electrical Manufacturers Association is a not for profit corporation that has neither a parent nor stockholders.

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PETITION FOR A WRIT OF CERTIORARI

The National Electrical Manufacturers Association (NEMA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-21) is reported at 272 F.3d 104. The opinion of the district court (App. 24-37) is reported at 72 F. Supp.2d 449.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A timely petition for rehearing was denied on January 8, 2002. App. 22-23. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides: "The Congress shall have power . . . [t]o regulate commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

Vermont Statutes Annotated title 10, § 6621d(a) (1998, as amended 1999), provides in pertinent part:

> Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and the retailer may not knowingly sell, any of the following items at retail if they contain mercury added during manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a

> waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler or retailer . . . . Items to be labeled are: . . . A lamp.

Vermont Solid Waste Management Rules § 6-803 provides in pertinent part:

> Mercury-Added Consumer Products
>
> To facilitate the source reduction of mercury from solid waste and to help ensure proper handling, recycling and disposal of waste mercury-added consumer products, certain mercury-added items must be labeled prior to sale.
>
> (1) After July 1, 1999, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the items listed in 10 V.S.A. §6621d(a) at retail if they contain added mercury, unless the item is labeled in accordance with Subsections 6-803(b) or (c).
>
> (2) Items to be labeled are: . . . (E) A lamp.
>
> The following labeling standards shall apply to all mercury-added consumer products listed in Subsection 6-803(a)(2) above:

(1) The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that mercury does not become part of solid waste or wastewater.

(2) A label must be clearly visible and legible to consumers prior to purchase of the product. The label must be located on a surface of the product that is visible during installation and removal.

(3) For labels affixed to products, the required words or symbols must be printed, mounted, molded, or engraved on the surface of the product using materials sufficiently durable to remain legible for the useful life of the product.

(4) For products with enclosed mercury-added switches, both the enclosed device and the larger product must be labeled.

(5) A listed mercury-added consumer product must be labeled if manufactured after July 1, 1999.

(6) Primary responsibility for affixing the required labels shall be on the manufacturer, and not on the wholesaler or retailer.

STATEMENT OF THE CASE

Mercury-containing lamps ("lamps"), such as the familiar fluorescent light bulb, are energy efficient

alternatives to incandescent lighting. Their use reduces energy production and results in a net reduction of the emission of pollutants (including mercury) into the environment. App. 26. Due to their energy efficiency and pollution-reducing qualities, the United States Environmental Protection Agency has made the use of fluorescent lamps a major element of the United States' global climate change efforts. JA 52.[1]

Vermont Stat. Ann. tit. 10, § 6621d and its implementing regulation, Vermont Solid Waste Management Rules § 6-803 (collectively the "Vermont labeling law" or the "law"), require that specified labeling be permanently affixed to both lamps themselves and their packaging. The mandated label, which no jurisdiction in the world but Vermont requires, must state that the lamps contain mercury, and that all such lamps must be disposed of by recycling or as hazardous waste.

The Vermont labeling law provides that "[p]rimary responsibility for affixing labels . . . shall be on the manufacturer, and not on the wholesaler, or retailer." Vt. Stat. Ann. 6621d(a). The labeling requirement has no effect on lamp manufacturers or manufacturing facilities in Vermont because none exist.

NEMA brought this constitutional challenge to the Vermont labeling law on behalf of its lamp manufacturer members, alleging that the law violates the dormant Commerce Clause.[2]

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[1] Citations with the notation "JA" refer to items in the parties' Joint Appendix before the court of appeals.

[2] NEMA also alleged that the Vermont labeling law violates the First Amendment and is preempted by the federal Resource Conservation and Recovery Act.

1. *The District Court Proceedings*. On November 8, 1999, following a three-day evidentiary hearing, the District Court (D. Vt., Murtha, J.) entered a preliminary injunction enjoining the Vermont labeling law insofar as it requires the labeling of mercury-containing lamps. App. 24-25, 36-37.

In a published opinion, the District Court made extensive findings of fact and concluded that NEMA had established a substantial likelihood that the Vermont labeling law violates the dormant Commerce Clause, applying the familiar *Pike* balancing test:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

App. 34 (quoting *Pike*, 397 U.S. at 142). The District Court held that the burdens of the Vermont labeling law are "clearly excessive in relation to the asserted local benefits," and that an "equally or more effective" and far less burdensome alternative exists. App. 34, 30.

Specifically, the District Court found that the Vermont labeling requirements are "onerous," operating only "at great cost to manufacturers." App. 34, 32. Lamps ultimately sold to end-users in Vermont are made by 11 domestic and foreign companies, utilizing almost 200 production lines in 60 manufacturing plants located on four

continents. App. 28, 31; JA 249-52, 56-57. Over 4800 varieties of lamps are manufactured and "shipped to [customers'] central distribution centers which serve large regions" of the United States. App. 28. As the District Court found, "[i]t is impossible [for the manufacturers] to predict whether any particular lamps will eventually end up on a particular retailer's shelf either in Vermont or anywhere else in the United States." *Id.*

Lamps sold in Vermont account for only about one quarter of one percent of the 600 million lamps sold annually in the United States, and an even smaller percentage of the 2.1 billion lamps sold worldwide. *Id.*; Supplemental JA 621. The costs of developing and implementing a separate production and distribution system only for Vermont lamps—because of such wide-scale replication of processes and facilities across the globe as would be necessary—is so great that "[a]s a practical matter, it appears manufacturers will either refrain from selling mercury-containing lamps in Vermont or will have to label all bulbs manufactured world-wide with the Vermont-required label." App. 29.

Moreover, labeling all lamps worldwide would raise serious practical and legal problems. First, "[i]t is apparent that labeled bulbs which find their way to jurisdictions other than Vermont will cause confusion in that they identify the product as a hazardous waste which must be recycled. However, no jurisdiction has established recycling facilities for mercury-containing lamps, a factor which may discourage potential purchasers from buying these admittedly energy-efficient bulbs." *Id.*

Only two states—Vermont and Minnesota—require that consumers recycle lamps or dispose of them as hazardous waste. JA 60-61. Thus, a label informing consumers in other states that lamps are to be recycled or disposed as hazardous waste would be false. However, the federal government requires that certain high volume users

throughout the United States must either recycle certain of these lamps or dispose of them as hazardous waste. JA 59-60. Consequently, a label informing users that it is only in Vermont and Minnesota that lamps must be recycled or disposed of as hazardous waste would also be false.

Second, "[t]here is only so much information which can be placed on lamps and packaging. Because of spatial limitations, any other state which may want to control the disposal of mercury-containing lamps by insisting on a different message would either have to abandon a labeling proposal or choose to be bound by Vermont's legislated message." App. 35.

Based upon extensive expert testimony, the District Court found an "equally or more effective" and far less burdensome way for Vermont to achieve its objectives. App. 30. This alternative would entail the posting of point-of-sale information signs in Vermont retail stores to inform consumers that lamps contain mercury and should be recycled or disposed as hazardous waste; the provision of the same information to wholesalers and commercial customers through commercial information sheets and invoice notices; and the development and provision of community educational information for Vermont communities. App. 29, 30, 34-35; JA 9-11.

Finally, the District Court held that because the State of Vermont cannot be required to pay damages for a constitutional violation due to its Eleventh Amendment immunity, the "great cost" that would be imposed on NEMA's members by the Vermont labeling requirements absent a preliminary injunction constitutes irreparable injury. App. 32-33 (citing *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2nd Cir. 1999) (irreparable injury will be found "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the

action the parties cannot be returned to the position they previously occupied")).

2. *The Second Circuit Proceedings.* The Second Circuit did not overturn any of the District Court's findings of fact, nor did it disagree with the District Court's determination that NEMA's members would suffer irreparable harm absent a preliminary injunction. Instead, it reversed the District Court's entry of the preliminary injunction based solely on the Court of Appeals' interpretation of the dormant Commerce Clause. The Second Circuit held, without citing any decision of this Court as authority, that a law "must impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that imposed on intrastate commerce . . ." before balancing under *Pike* is required. App. 6 (emphasis added) (citing *Old Bridge Chemicals, Inc. v. N.J. Dept. of Env. Prot.*, 965 F.2d 1287, 1295 (3rd Cir. 1992); other citations omitted). "[I]f no such *unequal* burden be shown, a reviewing court need not proceed further." App. 6 (emphasis added); *see also* App. 7, 8 (a "disparate" or "disproportionate[]" burden is required).

The Vermont labeling law, the Second Circuit reasoned, does not meet this "unequal burden" requirement because the law imposes the same regulatory burdens on "lamp producers both inside and outside Vermont," not only on out-of-state producers. App. 11, 6. On this basis, the court reasoned that the state political process could be relied upon to regulate in accordance with the dormant Commerce Clause's federal imperative. App. 7, 12. The court reached that conclusion even though there are no lamp manufacturers or lamp manufacturing facilities in Vermont.

The Second Circuit identified two "types of burdens on interstate commerce [that] would qualify as 'disparate' to trigger *Pike* balancing": (1) "control of commerce that occurs wholly beyond the state's borders"; and (2) a "risk of

imposing regulatory requirements inconsistent with those of other states." App. 7-8. As to the first, the Court held that Vermont has not regulated outside its borders because the Vermont law does not "inescapably" require compliance with its labeling requirements outside of Vermont. App. 9. As to the second type of burden, the court held that other states have not yet imposed labeling requirements of their own, and thus there is as yet no "actual conflict" with the regulatory schemes of other states. App. 13.[3]

Having concluded that no "disparate burden" exists, the Second Circuit declined to address the district court's factual findings regarding the magnitude of the burden imposed by the labeling law or the existence of less burdensome alternatives.

On January 8, 2002, the Second Circuit denied NEMA's petition for rehearing and suggestion for rehearing

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[3] In the court of appeals, NEMA had argued that these features of the Vermont labeling law provided *independent* grounds for invalidating the law under the Commerce Clause, separate from the *Pike* balancing test. NEMA contended that the Vermont law directly regulates out-of-state commerce, because (i) its "practical effect" is to require labeling of every fluorescent lamp sold in the United States or the world; and (ii) it interferes with the ability of other states to regulate the labeling or disposal of lamps because the Vermont label suggests special disposal is required only in Vermont and because limited space on lamps and packaging would make it impossible for other states to require labels different from Vermont's. *Cf. Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336-37 (1989) (Connecticut statute unconstitutional because it "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."). The District Court agreed with NEMA's arguments. *See* App. 35 ("By proposing a labeling scheme which essentially requires lamp manufacturers to label all lamps in conformity with Vermont law, Vermont is presuming to legislate outside its own boundaries."); *id.* ("Because of spatial limitations, any other state which may want to control the disposal of mercury-containing lamps by insisting on a different message would either have to abandon a labeling proposal or choose to be bound by Vermont's legislated message.")

en banc. The Second Circuit and Circuit Justice Ginsburg denied NEMA's motion for a stay of the Second Circuit's mandate pending NEMA's filing of a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION SIGNIFICANTLY ALTERS ANALYSIS OF STATE LAWS UNDER THE COMMERCE CLAUSE, AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Second Circuit's decision effectively eliminates the second tier of this Court's established dormant Commerce Clause analysis and deepens a split in the federal circuits. More specifically, the Second Circuit in accord with the Third and Seventh Circuits has held that, when a state law is challenged under the dormant Commerce Clause, the *Pike* balancing test does not apply in the absence of a threshold showing that the burdens placed by the law on interstate commerce are "disparate" or "discriminatory" compared with those placed by the law on local commerce. The decisions of the Second, Third and Seventh Circuits adopting this revisionist approach to Commerce Clause analysis conflict with decisions of the Fifth, Sixth, Eighth and Tenth Circuits and this Court.

The Second, Third and Seventh Circuits have effectively held that state laws that regulate interstate and intrastate commerce "evenhandedly" are per se constitutional, even if the burden that a law imposes on interstate commerce is clearly excessive in relation to the local benefits conferred. Indeed, the Second Circuit went even further in this case, declining to find a disparate burden sufficient to trigger a *Pike* analysis even though the burden of complying with the Vermont law falls entirely on interstate

commerce because there are no lamp manufacturers in Vermont. In the Second Circuit, therefore, a practical disparity is not enough to warrant application of the *Pike* balancing analysis. Instead, the discrimination must appear on the face of the statute.

Review is warranted to resolve the conflict on this important issue of constitutional law.

A. This Court Applies A Two-Tiered Analysis Under the Dormant Commerce Clause.

The Commerce Clause provides that "[t]he Congress shall have power . . . [t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States. . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citing authorities).

The power-limiting aspect of the Commerce Clause—the so-called "negative" or "dormant" Commerce Clause—is founded on the "premise, well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (citing *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976)); *see also Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 98-99 (1994) ("[T]he states are not separable economic units.").

The power-limiting aspect of the Commerce Clause is implemented through "what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986); *see General Motors Corp. v. Tracy*, 519 U.S. 278, 299

(1997) ("two strands of analysis") (citing *Brown-Forman Distillers*); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 762 (1995) (Kennedy, J. concurring, joined by O'Connor, J.) ("two modes of analysis") (citing *Brown-Forman Distillers*). The first tier of scrutiny establishes a ban against state laws that discriminate against or directly regulate interstate commerce. *E.g., Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.") (citations omitted); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism'" in violation of the dormant Commerce Clause "may be made on the basis of either discriminatory purpose . . . or discriminatory effect.") (citations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (same) (citations omitted).

The first tier of dormant Commerce Clause scrutiny is not limited to state laws that facially discriminate against interstate commerce, but also extends to laws that are discriminatory in their "practical effect." *See Hunt v. Washington Apple Adv. Comm'n*, 432 U.S. 333, 352-53 (1977) (holding state law invalid because it "has the *practical effect* of not only burdening interstate sales . . . but also discriminating against them") (emphasis added); *Brown-Forman Distillers*, 476 U.S. at 575-76, 582-83 (invalidating, as a forbidden "direct[]" regulation of interstate commerce, a New York law that on its face applied only to liquor "sales . . . in New York," because the "'practical effect' of the law is to control . . . prices in other States").

The second tier of dormant Commerce Clause scrutiny applies to state laws that have "only *indirect* effects on interstate commerce and regulate[] *evenhandedly*." *Brown-Forman Distillers*, 476 U.S. at 578-79 (citing *Pike*)

(emphasis added); *see also Oregon Waste Systems*, 511 U.S. at 98-99 (balancing test applies to "*nondiscriminatory* regulations that have only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (balancing test applies where "the challenged statute regulates *evenhandedly* with only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Edgar v. Mite*, 457 U.S. 624, 643 (1982) (balancing test applies "when a statute regulates interstate commerce *indirectly*") (citing *Pike*) (emphasis added). Under the second-tier balancing test, "evenhanded" state laws with only "indirect" effects on interstate commerce (*Brown-Forman Distillers*) are unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The balancing test includes consideration of "the nature of the local interest involved, and ... whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

This Court consistently has held that no discrimination is required for a statute to be reviewed or held unconstitutional under the second-tier balancing test. *See General Motors*, 519 U.S. at 299 n.15 ("[O]ur cases have indicated that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause, when . . . 'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'") (quoting *Pike*) (brackets omitted)); *see, e.g., Edgar*, 457 U.S. at 646 ("We conclude . . . that the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause."); *Raymond Motor Transport v. Rice*, 434 U.S. 429, 447 (1978) ("[W]e are persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative

contribution to highway safety."); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."); *see also U.S. v. Lopez*, 514 U.S. 549, 579-80 (1995) (Kennedy, J. concurring, joined by O'Connor, J.) ("One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 337 (1993) (Stevens, J. dissenting) ("The Court has long recognized that a burden on interstate commerce may be invalid even if the same burden is imposed on local commerce. . . . The fact that an impermissible burden is most readily identified when it discriminates against nonresidents does not justify immunizing conduct that evenhandedly disrupts both local and interstate travel.").

B. The Court of Appeals' Decision Deepens A Conflict In The Circuits and Conflicts With Decisions Of This Court.

Squarely in conflict with this Court's dormant Commerce Clause doctrine, the Second, Third and Seventh Circuits now require, as a prerequisite to applying the *Pike* balancing test, that the burden imposed on interstate commerce by the state law must be "discriminatory" (Third Circuit) or "disparate," "disproportionate," "different" or "unequal" to the burden imposed on intrastate commerce (Second and Seventh Circuits). *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3rd Cir. 1994) ("[U]nder this court's precedent . . . legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory* burdens on interstate commerce.") (emphasis in original) (quoting *Old Bridge Chemicals, Inc. v. N.J. Dept. of Env. Prot.*, 965 F.2d 1287, 1295 (3rd Cir. 1992) (same));

National Electrical Mfrs. Ass'n, App. 6 ("For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that imposed on intrastate commerce.") (citing *Old Bridge Chemical*; other citations omitted) (emphasis added); App. 6 ("[I]f no such *unequal* burden be shown, a reviewing court need not proceed further.") (emphasis added); App. 7, 8 (requiring a "disparate" or "disproportionate" burden); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause."); *K-S Pharmacies, Inc. v. American Home Products*, 962 F.2d 728, 731 (7th Cir. 1992) ("Courts demand more than hypothetical rationality of statutes [under *Pike*] only when the laws create a *differential* burden on interstate commerce. . . .") (emphasis in original).

This superimposed prerequisite to the *Pike* balancing test is squarely in conflict with doctrine in the Fifth, Sixth, Eighth and Tenth Circuits, which have explicitly or implicitly rejected the "different burden" requirement. Moreover, the new prerequisite eviscerates the second tier of this Court's dormant Commerce Clause doctrine.

The Tenth Circuit has specifically rejected any "different burden" requirement, explaining that it is both illogical and inconsistent with the law established by this Court:

> Defendants contend that when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce. Defendants' argument is

> not only circular, but it completely misstates the *Pike* analysis.
>
> By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce. Furthermore, the Supreme Court has made clear that the extent of the burden on interstate commerce is a key inquiry under the *Pike* analysis.

Dorrance v. McCarthy, 957 F.2d 761, 764 (10th Cir. 1992) (citations omitted); *accord Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers*, 27 F.3d 1499, 1511-12 (10th Cir. 1994) ("The . . . hazardous waste zoning ordinance operates evenhandedly because . . . it confers no advantages on in-state entities . . . as against out-of-state firms. Consequently, we must apply the balancing test set forth in *Pike*. . . ."); *id.* at 1512 ("[T]he [district] court erred by bypassing the balancing analysis required by *Pike*. The court's exclusive focus on animus against interstate interests neglected completely the role of the dormant Commerce Clause in prohibiting unreasonable incidental burdens on interstate commerce, even when there is no discriminatory animus involved against interstate commerce.").[4]

Moreover, the Fifth, Sixth and Eighth Circuits have all struck down non-discriminatory state laws under the *Pike* balancing test, without requiring any "discriminatory," "different" or "disparate" burden on interstate commerce as a

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[4] Respondents have asserted, incorrectly, that a later decision of the Tenth Circuit has abandoned *Dorrance*'s interpretation of *Pike* and substituted the Second Circuit's interpretation, *citing V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997). In fact, *V-1 Oil* specifically reaffirmed *Dorrance* as the authoritative "appl[ication of] *Pike* principles" in the Tenth Circuit. 131 F.3d at 1424.

prerequisite to the balancing inquiry. *See, e.g., Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 502-03 (5th Cir. 2001) ("The absence of . . . discrimination, either facially or in practical effect, removes [the challenged law] from the Supreme Court's definition of a discriminatory law. The controlling question thus becomes whether, under *Pike v. Bruce Church*, 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'") (quoting *Pike*); *Service Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75 (5th Cir.), *aff'd mem.*, 449 U.S. 913 (1980) (holding that *Pike*'s balancing test "assumes that the challenged law does *not* discriminate against interstate commerce" and striking down under *Pike* a law requiring all persons seeking employment within parish to register, whether they were from in-state or out-of-state) (emphasis added); *McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000) (holding statute unconstitutional because it discriminated in practical effect against interstate commerce and holding in the alternative that statute would be unconstitutional under the *Pike* balancing test: "Even were Ohio's statute not so obviously discriminatory as to subject it to strict scrutiny review under the dormant Commerce Clause . . . we would still find that the burden it imposes is 'clearly excessive in relation to the putative local benefits.'") (quoting *Pike*); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 237 (6th Cir. 1986) (holding unconstitutional under the *Pike* balancing test a Michigan law requiring any natural gas company doing business within state to obtain state approval before issuing securities), *aff'd on other grounds*, 485 U.S. 293 (1988); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000) (waste disposal ordinance struck down even though it "does not overtly discriminate against interstate commerce on its face, in its purpose, or through its effects[;] the ordinance may still violate the dormant Commerce Clause if the local interests that it serves do not justify the

burden that it imposes upon interstate commerce"); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 285 (8th Cir. 1993) (application of non-discriminatory Missouri banking laws to Nebraska lender violated *Pike* balancing test); *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986) ("It would not unduly tax the imagination to conceive of nondiscriminatory state legislation that advances some legitimate safety objective slightly, yet imposes massive burdens on interstate commerce. An analysis that disregards this fact by failing to balance the burdens imposed on interstate commerce against the local interest involved cannot be considered an accommodation of the competing demands of the state and national interests.")

As detailed above, the Second, Third and Seventh Circuit decisions also conflict with decisions of this Court, which never have required any element of discrimination or inequality of burden as a prerequisite to applying the second-tier balancing test. Such discrimination against interstate commerce is instead the *sine qua non* of a law's invalidity under tier-one review. *See* pp. 11-14 *supra*. As this Court has explained, "'discrimination' simply means *differential* treatment of in-state and out-of-state economic interests that *benefits* the former and *burdens* the latter." *Oregon Waste Systems*, 511 U.S. at 98-99 (emphasis added); *accord Bacchus Imports, Ltd.*, 468 U.S. at 273 ("Virtually every discriminatory statute allocates *benefits or burdens unequally*; each can be viewed as conferring a *benefit* on one party and a *detriment* on the other, in either an absolute or relative sense.") (emphasis added); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) ("Because nothing in the Indiana Act imposes a *greater burden* on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act *discriminates* against interstate commerce.") (emphasis added).

Laws that potentially implicate the Second, Third and Seventh Circuits' requirement of a "discriminatory," "different," or "disparate" burden should—according to this Court's settled doctrine—properly be adjudicated (valid or invalid) under the first tier of dormant Commerce Clause review. By imposing that same requirement as a prerequisite to the exercise of second-tier balancing, these circuits have rendered the second-tier test superfluous: Laws that do not discriminate against or directly regulate interstate commerce either facially or in their practical effect (and have thus survived tier-one scrutiny) by definition could not impose a "discriminatory," "different," or "disparate" burden so as to qualify for second-tier balancing.[5]

In short, the *Pike* test was designed to apply to laws that regulate "evenhandedly," *Pike*, 397 U.S. at 142, yet the Second, Third and Seventh Circuits now apply the test only if the state law does *not* regulate evenhandedly.

The decisions of these Circuits adopt an approach to Commerce Clause analysis that was expressly rejected by this Court decades ago. As the Court explained in *Raymond*:

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[5] The Second Circuit offers, as an example of a "disparate" or "disproportionate" burden that would "qualify" for balancing, a law's "control of commerce that occurs wholly beyond the state's borders" – i.e., a law's "extraterritorial operation." *National Electrical Mfrs. Ass'n*, App. 7-8, *citing Healy v. Beer Inst.*, 491 U.S. at 332, and *Brown-Forman Distillers Corp.*, 476 U.S. at 582. But in both *Healy* and *Brown-Forman*, this Court held the statutes at issue unconstitutional as *direct* regulations of interstate commerce. *See Healy*, 491 U.S. at 336-37 & nn. 13-14; Brown-*Forman Distillers*, 476 U.S. at 579, 584. In both cases, this Court applied first-tier analysis and never reached the second-tier *Pike* balancing test. The Court examined the state laws' "practical effect" and "struck [them both] down . . . without further inquiry" into claimed local benefits. *See Healy*, 491 U.S. at 336-37 & nn. 13-14; *Brown-Forman*, 476 U.S. at 579, 584.

> We acknowledge, as did the Court in *Bibb*, that there is language in [*South Carolina State Highway Department* v.] *Barnwell Bros.* [303 U.S. 177 (1938)] "which, read in isolation from . . . later decisions . . . would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce." 359 U.S., at 528-529. . . . But *Bibb* rejected such a suggestion. . . . [*Id.*] at 524, . . . *quoting Southern Pacific Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775-76 . . . (1945). Thus, we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.[6]

434 U.S. at 443 (emphasis added), *quoted with approval in Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670-71 (1981).

The Third Circuit has purported to justify the "discriminatory burden" prerequisite on the ground that, if the second-tier balancing test is applied to a law that regulates in-state producers the same way as out-of-state producers, the effect will be to give out-of-state producers a right not enjoyed by in-state producers to challenge commercial legislation. *Old Bridge*, 965 F.2d at 1295. This

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[6] Although the Second Circuit sought to distinguish *Bibb* and *Southern Pacific*, those decisions (among many others) require application of the balancing analysis to state laws that are non-discriminatory and "even-handed."

Court has held, however, that a basic reason for judicial scrutiny under the dormant Commerce Clause is that out-of-state producers do not enjoy the political leverage enjoyed by in-state producers to participate effectively in a state legislature, so they need the judicial protection of the dormant commerce clause, whereas in-state producers do not. As this Court observed in *Southern Pacific*:

> [T]he Court has often recognized that *to the extent that the burden of state regulation falls on interests outside the state*, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

325 U.S. at 767-68 n.2 (emphasis added).

In short, the courts of appeals have split 4-3 on a recurring constitutional issue of great importance. This Court's decision in *Pike*—which established the modern second-tier balancing test—has been cited more than 790 times in the lower federal courts and state courts, and in more than 970 secondary sources (Westlaw KeyCite result for *Pike*). If this Court's unanimous decision in *Pike* is to be modified or overruled, it should be done by this Court, not by the courts of appeals. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

C. This Case Provides A Suitable Vehicle For Resolving The Conflict.

The District Court made extensive findings of fact in support of its ruling that the burden imposed by the Vermont labeling law on interstate commerce is clearly excessive in relation to the putative local benefits. That court found, among other things, that the labeling requirements are "onerous" and will operate "at great cost to manufacturers." *See* p. 5 *supra*. Because more than 4800 varieties of lamps are manufactured and shipped to customers' central

distribution centers serving large regions of the United States, "[a]s a practical matter, it appears that manufacturers will either refrain from selling mercury-containing lamps in Vermont or will have to label all bulbs manufactured world-wide with the Vermont-required label." *See* p. 6 *supra.*

Moreover, "[t]here is only so much information which can be placed on lamps and packaging." *See* p. 7 *supra.* Labeling all lamps as hazardous waste that must be recycled or disposed of as hazardous waste would cause widespread confusion, because only two states impose such a requirement on consumers. Informing users that lamps must be recycled or disposed of as hazardous waste only in Vermont and Minnesota would be false, because federal law requires certain high-volume users throughout the United States to engage in recycling or hazardous waste disposal. *See* pp. 6-7 *supra.* Finally, the District Court found that there were "equally or more effective" ways for Vermont to achieve its objectives with far less burden on interstate commerce. *See* p. 5 *supra.* There is a clear evidentiary record here supporting the application of this Court's second-tier balancing test under the dormant Commerce Clause, which makes this case a suitable vehicle for resolving the conflict among the circuit courts.

The Second Circuit did not overturn any of these findings of fact. Nor did it hold, or even suggest, that the Vermont labeling law could survive review under a traditional "even-handed" *Pike* analysis. Instead, the Second Circuit rested its decision solely on its holding that the *Pike* analysis applies only if the state law imposes an "unequal burden" on interstate commerce. App. 6-13.

Indeed, the Second Circuit's decision went even further, by holding that the Vermont labeling law is not subject to *Pike* analysis even though there are no Vermont lamp manufacturers or manufacturing facilities, and therefore the law, as a practical matter, places a disproportionate

burden on out-of-state businesses. In so ruling, the Second Circuit has disregarded this Court's cases holding that "[t]he critical inquiry [under the dormant Commerce Clause] is . . . the practical effect of the regulation . . . ." *E.g., Healy v. Beer Institute*, 491 U.S. at 336.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: APRIL 8, 2002

United States Court of Appeals
Second Circuit

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, Plaintiff-Appellee,

v.

William H. SORRELL, Attorney General of the State of Vermont, John Kassel, Vermont Agency of Natural Resources, Defendants-Appellants,

Conservation Law Foundation, Inc., Vermont Public Interest Research Group, Vermont Natural Resources Council, Inc., National Wildlife Federation, Lake Champlain Committee, New Hampshire, State of, New Hampshire Department of Environmental Services, Mercury Policy Project, Movants.

Docket No. 99-9450.

Argued July 12, 2000.
Decided Nov. 6, 2001.

Ronald A. Shems, Assistant Attorney General, (William H. Sorrell, Attorney General, Rebecca Ellis, Dianne H. Sanford, Assistant Attorneys General, on the brief), Montpelier, VT, for defendants-appellants.

Steven J. Rosenbaum, Covington & Burling (Anthony J. Vlatas, on the brief), Washington, DC, and Geoffrey W. Crawford, O'Neill, Crawford & Green, Burlington, VT, for plaintiff-appellee.

Bernard D. Lambek, Paterson & Walke, Montpelier, VT, for movants.

Maureen F. Leary, Assistant Attorney General of the State of New York (Eliot Spitzer, Attorney General, Preeta D. Bansal, Solicitor General, Daniel Smirlock, Deputy Solicitor

General, Christopher Amato, Maureen F. Leary, Assistant Attorneys General, on the brief), Albany, NY, for amici curiae States of New York, Alaska, California, Connecticut, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, and Oklahoma.

Before WALKER, Chief Judge, POOLER and SOTOMAYOR, Circuit Judges.

JOHN M. WALKER, JR., Chief Judge:

Defendants-appellants William H. Sorrell, Attorney General of the State of Vermont, and John Kassel, Secretary of the Vermont Agency of Natural Resources ("Vermont defendants"), appeal from a preliminary injunction imposed by the United States District Court for the District of Vermont (J. Garvan Murtha, *Chief District Judge*) barring enforcement of a Vermont labeling statute as it applies to manufacturers of mercury-containing light bulbs. Because we find that plaintiff-appellee National Electrical Manufacturers Association ("NEMA") failed to show a likelihood of success on the merits of its Commerce Clause and First Amendment claims, we vacate the preliminary injunction and remand for further proceedings.

BACKGROUND

In 1998, the Vermont Legislature enacted a statute, Vt. Stat. Ann. tit. 10, § 6621d(a), that requires manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of

as hazardous waste.[1] Among the products so regulated are mercury-containing fluorescent light bulbs, denominated as "lamps" in subsection (5) of section 6621d(a). The Vermont Agency of Natural Resources has promulgated a rule to implement the labeling requirement. *See* Vt.Code R. 12-036-003, § 6-803.

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[1] Section 6621d(a) reads, in relevant part, as follows:

Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the following items at retail if they contain mercury added during manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler or retailer.... Items to be labeled are:

(1) A thermostat or thermometer.

(2) A switch, individually or as part of another product.

(3) A medical or scientific instrument.

(4) An electric relay or other electrical device.

(5) A lamp.

(6) A battery, sold to the public, other than a button battery.

Vt. Stat. Ann. tit. 10, § 6621d(a). Vermont also prohibits the disposal of "[l]abeled mercury-added consumer products" in solid waste landfills. *See* Vt. Stat. Ann. tit. 10, § 6621a(a)(7).

On July 27, 1999, NEMA, on behalf of its lamp-manufacturer members, sued the Vermont defendants claiming, among other things, that both the statute and its underlying regulations violate NEMA's members' rights under the United States Constitution's Commerce Clause and First Amendment. Following an extended hearing, the district court, on November 8, 1999, preliminarily enjoined the defendants from enforcing section 6621d(a) and its accompanying regulations, finding that NEMA had demonstrated irreparable harm and a likelihood of success on the merits. *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 72 F.Supp.2d 449, 456 (D.Vt.1999) (hereinafter "*NEMA*"). According to the district court, NEMA was irreparably harmed because (1) if NEMA ultimately prevailed, the state defendants would be shielded by the Eleventh Amendment from damages claims, and thus NEMA's members could not recover money spent to comply with the statute, and (2) the statute infringed NEMA's First Amendment rights by forcing its members to speak. *Id.* at 454.

The district court determined that NEMA had demonstrated a likelihood of success on the merits of its Commerce Clause claim because (1) the statute's burdens outweighed its benefits, and (2) as a practical matter, Vermont was regulating conduct that would occur entirely beyond its borders. *Id.* at 454-55. The district court also found that Vermont was unable to justify the labeling law under the First Amendment. *Id.* at 455-56.

The Vermont defendants appealed. The State of New York filed an amicus brief in support of the appeal, joined by the States of Alaska, California, Connecticut, Maine, Minnesota, New Hampshire, New Jersey, New Mexico, and Oklahoma.

DISCUSSION

Insofar as pertinent to our disposition, the Vermont defendants argue in support of section 6621d(a) that, in finding a likelihood of success on the merits, the district court erred (1) by applying heightened scrutiny under the Commerce Clause to a nondiscriminatory statute and balancing a hypothetical label against hypothetical costs, and (2) by applying heightened scrutiny to the First Amendment compelled speech claim. The amici argued in addition that the labeling law was authorized by Congress in the federal hazardous waste management statute, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, and thus the state statute is not vulnerable to challenge under the Commerce Clause. Because we conclude that NEMA has not demonstrated a likelihood of success on the merits of its Commerce Clause and First Amendment claims, we vacate the injunction.

I. Commerce Clause

A statute may violate the well-established "dormant" aspect of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, in one of two ways: it may clearly discriminate against interstate commerce, in which case it is virtually invalid per se, *see Wyoming v. Oklahoma,* 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), or even if it does not evince such discriminatory effect, it may still be unconstitutional if it imposes a burden on interstate commerce incommensurate with the local benefits secured, *see Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). NEMA argues that section 6621d violates the Commerce Clause in the latter manner. We disagree and thus conclude that NEMA cannot show likely success on the merits of its Commerce Clause claim.

In *Pike,* the Supreme Court adopted a balancing test to determine whether state statutes that incidentally burden interstate commerce violate the Commerce Clause. The

Court held that

> [w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citations omitted). For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce. *See Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir.1998); *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68, 75 (2d Cir.1996) (quoting *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir.1994)); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1287 (2d Cir.1995); *see also Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir.1994); *Old Bridge Chem., Inc. v. N.J. Dep't of Envtl. Prot.*, 965 F.2d 1287, 1295 (3d Cir.1992); *K S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir.1992). Under *Pike*, if no such unequal burden be shown, a reviewing court need not proceed further.

The focus of our disparate burden analysis is a state's shifting the costs of regulation to other states. *See S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184-85 n. 2, 58 S.Ct. 510, 82 L.Ed. 734 (1938) ("State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of

those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted."); *see also* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 11.7, at 150 (3d ed.1999); Laurence H. Tribe, *American Constitutional Law* § 6-5, at 409 (2d ed.1988). Such circumstances raise the risk that state policymakers will not bear the true political costs of their decisions, because those costs will fall in some measure on the residents of other political jurisdictions. *See S. Pac. Co. v. Arizona,* 325 U.S. 761, 767-68 n. 2, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."); *S.C. State Highway Dep't,* 303 U.S. at 185 n. 2, 58 S.Ct. 510. Accordingly, the justification for judicial intervention in the absence of congressional action may outweigh the strong tradition of judicial deference to legislative decisions, *see* 2 Rotunda & Nowak, *supra,* § 11.11; Tribe, *supra,* § 6-15, at 411, and the strain on judicial competence imposed by comprehensive cost/benefit balancing, *cf. CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69, 95, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (Scalia, J., concurring in part and concurring in the judgment) (stating that "such [a balancing] inquiry is ill suited to the judicial function and should be undertaken rarely if at all").

While several types of burdens on interstate commerce would qualify as "disparate" to trigger *Pike* balancing, *see, e.g., Pac. Northwest Venison Producers,* 20 F.3d at 1015, NEMA cites two in particular in this case: (1) control of commerce that occurs wholly beyond the state's borders; and (2) risk of imposing regulatory requirements inconsistent with those of other states. Regulations that fall into the first category may be said to have extraterritorial

operation, while those in the second may be said to create interstate regulatory conflicts.

A. Extraterritoriality.

A regulation may disproportionately burden interstate commerce if it has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 332, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). *Healy* and *Brown-Forman Distillers* involved efforts by a state to control the prices at which goods are sold in the state by pegging them to the lowest price charged for the same goods in other states. The effect of those price-regulation statutes on commerce in foreign states was inescapable: they "necessarily require[d] out-of-state commerce to be conducted according to in-state terms." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir.1995).

Given the manufacturing and distribution systems used by its members, NEMA argues that, if its members continue selling in Vermont, they would also be forced as a practical matter to label lamps sold in every other state. The district court agreed[2] and concluded that Vermont was "presuming to legislate outside its own boundaries." *NEMA*, 72 F.Supp.2d at 455. We disagree.

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[2] More precisely, the district court found that the potential costs of compliance "would require manufacturers either to stop selling in Vermont, to change [their] distribution system to isolate bulbs going to Vermont, or to label all lamps to comply with Vermont law." *NEMA*, 72 F.Supp.2d at 453-54.

NEMA's extraterritoriality contention fails because the statute does not inescapably require manufacturers to label all lamps wherever distributed. The Vermont statute, by its terms, is "indifferent" to whether lamps sold anywhere else in the United States are labeled or not. *See, e.g., Cotto Waxo Co.*, 46 F.3d at 794. Unlike the restrictions involved in the Supreme Court's price-regulation cases, the statute here makes no mention of other states for any purpose. *See* Vt. Stat. Ann. tit. 10, § 6621d(a). To the extent the statute may be said to "require" labels on lamps sold outside Vermont, then, it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps.

To avoid the statute's alleged impact on other states, lamp manufacturers could arrange their production and distribution processes to produce labeled lamps solely for the Vermont market and then pass much of the increased costs along to Vermont consumers in the form of higher prices. This fact distinguishes the present case from the Supreme Court's price regulation cases. In cases like *Healy*, the state necessarily prevented firms from recouping any of the costs imposed by the state statute from the residents of the state itself. Here, the manufacturers remain free to charge higher prices only to Vermonters without risking violation of the statute.

To be sure, manufacturers will rarely be able to fully pass through to consumers the costs of a new tax or regulation. A lamp manufacturer's ability to pass costs along depends on the price elasticity of demand for lamps: the more responsive demand is to changes in price, the more added costs the manufacturer will be forced to absorb. But that manufacturers must bear some of the costs of the Vermont regulation in the form of lower profits does not cause the statute to violate the Commerce Clause. Such a

burden is simply attributable to legitimate intrastate regulation. The manufacturers are not required to adhere to the Vermont rule in other states.

It is possible, as the district court suggested, that the cost of labeling lamps solely for the Vermont market might cause them to be prohibitively expensive. *See NEMA,* 72 F.Supp.2d at 453. In other words, the demand for lamps in Vermont may be such that their increased price would so severely reduce consumption that the lamps could no longer be sold profitably in Vermont. In that event, lamp manufacturers might be compelled by economic necessity to withdraw from the Vermont market altogether.[3]

NEMA's lament that Vermont's labeling requirement violates the Commerce Clause because it effectively forces manufacturers not to sell lamps in Vermont is nonetheless unpersuasive for three reasons. First, it is axiomatic that the increased cost of complying with a regulation may drive up the sales price of the product and thus erode demand for the

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[3] The costs of manufacturing lamps solely for the Vermont market appear, at the moment, to be quite high. Such increased costs need not be permanent, however: the marketplace would reward manufacturers who can reduce those costs and thus sell lamps more cheaply than their competitors. As a result, we are skeptical that NEMA's present cost estimates capture the true costs of labeling over time and that those costs will force all lamp manufacturers from the Vermont market. *Cf. Exxon Corp. v. Governor of Md.,* 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (holding that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another").

product such that production becomes unprofitable. Consequently, any regulation may drive some or all producers or distributors from the regulating state. But in every such case, a decision to abandon the state's market rests entirely with individual manufacturers based on the opportunity cost of capital, their individual production costs, and what the demand in the state will bear. Because none of these variables is controlled by the state in this case, we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit. Although a regulation might violate the Commerce Clause by creating market incentives that encourage out-of-state manufacturers to abandon a state market while encouraging in-state manufacturers to pick up the slack, the instant regulation is evenhanded such that lamp producers both inside and outside Vermont would face the same putative need to develop separate production and distribution systems to accommodate simultaneously the Vermont market and other state markets.

Second, the manufacturers' choice to discontinue Vermont sales would not amount to a special, disproportionate injury to interstate commerce of the sort required by our precedents. If lamp manufacturers were to withdraw from the Vermont market, only Vermont residents would feel any appreciable effect, in the lost utility of mercury-bearing bulbs. Any loss felt by residents of other states would be minor by comparison.

The considerations here are quite different from those in cases cited by NEMA that involve state restrictions on interstate transporters. *See, e.g., Raymond Motor Transp., Inc. v. Rice,* 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959); *S. Pac. Co.,* 325 U.S. at 775, 65 S.Ct. 1515. Transporters forced either to abide by state rules or avoid the state entirely would necessarily be

impeded, if they chose the latter course, in their efforts to conduct commerce with the surrounding states because they would be unable to pass through the regulating state. That sort of distinct interstate burden is not presented in this case, however.

Finally, NEMA directs to the wrong forum its complaint that manufacturers will choose not to sell in Vermont. The risk that the labeling requirement would erode manufacturers' profits and thus encourage them to abandon the state is an appropriate consideration for the Vermont legislature, not the federal courts. Whether the unavailability of mercury-bearing lamps in the state redounds to the benefit of state residents is a question that the political branches of the State of Vermont were entitled to decide. *See Exxon Corp.*, 437 U.S. at 128, 98 S.Ct. 2207 ("It may be true that the consuming public will be injured by [the effect of the challenged regulation], but again that argument relates to the wisdom of the statute, not to its burden on commerce."); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir.1995) (noting that the Commerce Clause does not protect the citizens of a state against the questionable wisdom of decisions made by their own lawmakers).

B. Interstate Regulatory Conflicts.

NEMA also contends that the statute burdens interstate commerce by exposing its members to the possibility of multiple, inconsistent labeling requirements imposed by other states. A state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states. *See Raymond Motor Transp.*, 434 U.S. at 445, 98 S.Ct. 787; *Bibb*, 359 U.S. at 529-30, 79 S.Ct. 962; *Silver v. Woolf*, 694 F.2d 8, 14 (2d Cir.1982). *But cf.* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v.

Dynamics Corp. of America *and Dormant Commerce Doctrine; (II) Extraterritorial State Legislation,* 85 Mich. L.Rev. 1865, 1883 (1987) (suggesting that inconsistent regulation as a dormant Commerce Clause problem may be "limited to transportation cases"). It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states. *See Silver,* 694 F.2d at 14; *see also C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 406, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (O'Connor, J., concurring) ("This is not a hypothetical inquiry."); *Procter & Gamble Co. v. City of Chicago,* 509 F.2d 69, 77 (7th Cir.1975) ("The Supreme Court has indicated that in a case involving environmental legislation it is actual conflict, not potential conflict, that is relevant.").

No such conflict has been shown here. NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach. Indeed, there is record evidence that the Vermont statute is consistent with regimes under consideration by other states. While the scope of conflict required to state a dormant Commerce Clause claim is somewhat unclear, it is clear that the present case involves no conflict whatsoever.

C. Additional Considerations.

Were we to adopt NEMA's theory of the Commerce Clause, we would constitutionalize policy choices legitimately in the hands of Congress. Whatever the policy reasons may be in support of a nationally uniform regulatory framework for mercury-containing products, such a framework is not compelled by the Commerce Clause. "The idea that there is a general interest in [regulatory] uniformity is inconsistent with our [society's] decision to have separate states with separate legislative competencies, including

separate competences to regulate commerce." Regan, *supra,* at 1881. Such policy considerations appropriately rest with Congress, not the federal courts.

We therefore find persuasive the fact that Congress's principal effort to rationalize waste management - the Resource Conservation and Recovery Act - expressly leaves individual states with flexibility to adopt regulations more stringent than those imposed by the federal government. *See* 42 U.S.C. § 6929 ("Nothing in this [statute] shall be construed to prohibit any State or political subdivision thereof from imposing any requirements ... which are more stringent than those imposed by [the federal program]."). We have held that a federal statute's authorization of supplementary state regulation "confers upon [the state regulations], if not a shield, at least a sturdy buffer against [a] Commerce Clause [challenge]." *Grocery Mfrs. of Am. v. Gerace,* 755 F.2d 993, 1005 (2d Cir.1985). Although we do not think RCRA's savings provision is sufficient to shield completely the Vermont statute from dormant Commerce Clause scrutiny, *cf. Wyoming,* 502 U.S. at 458, 112 S.Ct. 789 (holding that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve ... a violation of the Commerce Clause"), Congress's enactment of § 6929 bolsters our conclusion that the Commerce Clause's "dormant" implication does not invalidate the Vermont statute.

II. First Amendment

In granting the preliminary injunction, the district court concluded that NEMA had also shown likely success on the merits of its First Amendment claim because section 6621d(a) "impinges on [NEMA's] First Amendment rights in that it 'indisputably requires them to speak when they would rather not.'" *NEMA,* 72 F.Supp.2d at 454 (quoting *Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 72 (2d Cir.1996)

(hereinafter "*IDFA*")). The district court held that the statute's "requirements are far more extensive than is necessary to advance the state's legitimate interests" and implied that the statute failed to "directly advance" those interests. *Id.* at 456. We think that the district court misperceived the proper standard to apply in this case and conclude that, when the proper standard is applied, the Vermont statute passes First Amendment muster.

NEMA concedes that only commercial speech is at issue in this case. Commercial speech is subject to "less stringent constitutional requirements" than are other forms of speech. *IDFA,* 92 F.3d at 72. Furthermore, within the class of regulations affecting commercial speech, there are "material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions on speech." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 650, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). Regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech and will be sustained if they are 'reasonably related to the State's interest in preventing deception of consumers.' *Id.* at 651, 105 S.Ct. 2265.

Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.[4] Such disclosure furthers, rather

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[4] NEMA has not argued on appeal that the Vermont label is inaccurate. Indeed, they would be hard-pressed to do so, given that (1) the labeled items in fact do contain mercury; (...continued)

than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 501, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996); *Zauderer,* 471 U.S. at 650-51, 105 S.Ct. 2265; Robert Post, *The Constitutional Status of Commercial Speech,* 48 U.C.L.A. L.Rev. 1, 28 (2000).

Additionally, the individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state, *see W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), are not ordinarily implicated by compelled commercial disclosure, *cf. Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 796 n. 9, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (holding that "[p]urely commercial speech is more susceptible to compelled disclosure requirements" than is personal or political speech). Required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own

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and (2) consumers are prohibited by law from disposing of "[l]abeled mercury-added consumer products" with ordinary solid waste, *see* Vt. Stat. Ann. tit. 10, § 6621a(a)(7).

personality.[5] *See* Post, *supra,* at 27.

We recognize that compelled disclosure of truthful, factual information might also trench on privacy concerns. Courts have accorded less weight to those concerns, however, in commercial settings and to corporate plaintiffs than where an individual's personal privacy is involved. *See, e.g., United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *United States v. McFillin,* 713 F.2d 57, 60 (4th Cir.1981); *Am. Future Sys., Inc. v. Pa. State Univ.,* 688 F.2d 907, 915-16 (3d Cir.1982). To the extent commercial speakers have a legally cognizable interest in withholding accurate, factual information, that interest is typically accommodated by the common law of property and its constitutional guarantors. *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003-04, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (discussing protection of trade secrets under the Fifth Amendment's Takings Clause).

In sum, mandating that commercial actors disclose commercial information ordinarily does not offend the important utilitarian and individual liberty interests that lie at the heart of the First Amendment. The Amendment is satisfied, therefore, by a rational connection between the purpose of a commercial disclosure requirement and the

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[5] Our decision reaches only required disclosure of factual commercial information. Requiring actors in the marketplace to espouse particular opinions would likely raise issues not presented here. *See Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265 (upholding advertising regulation that did not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (internal quotation marks omitted)).

means employed to realize that purpose. *See Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265. The Vermont statute meets this test.

Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal. The district court did not believe otherwise, but concluded that the Vermont statute was insufficiently precise in producing the desired ends. We believe that the district court did not appreciate the requisite connection between means and ends in a compelled commercial disclosure case such as this.

Zauderer, not *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech.[6]

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[6] Although we applied the *Central Hudson* test in *IDFA*--which addressed a Vermont regulation requiring dairy producers to label dairy products derived from cows treated with recombinant Bovine Somatotropin (rBST)--our decision was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of "consumer curiosity." *IDFA,* 92 F.3d at 73. The disclosure statute at issue here, however, is based on Vermont's substantial interest in protecting human health and the environment from mercury poisoning. Moreover, because our decision in IDFA was predicated on the state's inability to identify a sufficient legitimate state interest, we did not reach the proper relationship between a disclosure regulation's means and its ends, the issue we face here.

To be sure, the compelled disclosure at issue here was not intended to prevent "consumer confusion or deception" per se, *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265 (internal quotation marks omitted), but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products. Accordingly, we cannot say that the statute's goal is inconsistent with the policies underlying First Amendment protection of commercial speech, described above, and the reasons supporting the distinction between compelled and restricted commercial speech. We therefore find that it is governed by the reasonable-relationship rule in *Zauderer*.

We believe that such a reasonable relationship is plain in the instant case. The prescribed labeling would likely contribute directly to the reduction of mercury pollution, whether or not it makes the greatest possible contribution. It is probable that some mercury lamp purchasers, newly informed by the Vermont label, will properly dispose of them and thereby reduce mercury pollution. By encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination.

We find that the Vermont statute is rationally related to the state's goal, notwithstanding that the statute may ultimately fail to eliminate all or even most mercury pollution in the state. Accordingly, although we do not take issue with the district court's finding that "the largest source of mercury in the environment does not come from lamps," *NEMA*, 72 F.Supp.2d at 456, we ascribe different legal significance to it. In essence, the district court found the Vermont statute to be unconstitutionally underinclusive,

because it "does not get at all facets of the problem it is designed to ameliorate." *Zauderer,* 471 U.S. at 652 n. 14, 105 S.Ct. 2265. This analysis misses the mark. States are not bound to follow any particular hierarchy in addressing problems within their borders, as long as the state's response does not trench on fundamental rights. *See id.* The Supreme Court has held that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." *Id.* Absent interference with such a fundamental right, a state may choose to tackle a subsidiary cause of a problem rather than its primary cause, particularly where that primary cause lies out of its reach-for example, where the cause lies in the interstate transport of air pollutants from out-of-state, upwind power plants. *See NEMA,* 72 F.Supp.2d at 454 ("Power plants, especially those which burn coal, emit most of the mercury currently making its way into the environment. No coal burning plants are located in Vermont....").

Finally, we note the potentially wide-ranging implications of NEMA's First Amendment complaint. Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. *See, e.g.,* 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 781 (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these

long established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.

CONCLUSION

Because NEMA has failed to show a likelihood of success on the merits of either of its Commerce Clause or First Amendment claims, the preliminary injunction is vacated, and the case is remanded. Costs of the appeal will be borne by the appellees.

United States Court of Appeals,
Second Circuit.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of January two thousand and Two.

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, Plaintiff-Appellee,

v.

William H. SORRELL, Attorney General of the State of Vermont, John Kassel, Vermont Agency of Natural Resources, Defendants-Appellants,

Conservation Law Foundation, Inc., Vermont Public Interest Research Group, Vermont Natural Resources Council, Inc., National Wildlife Federation, Lake Champlain Committee, New Hampshire, State of, New Hampshire Department of Environmental Services, Mercury Policy Project, Movants.

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dkt #:
99-9450

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee National Electrical Mfgs.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By:_____
Arthur Heller, Administrative Attorney

Filed: Jan. 8, 2002

United States District Court,
D. Vermont.

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
v.
William H. SORRELL, as Attorney General of the State Vermont, and John Kassel, as Secretary, Vermont Agency of Natural Resources.

No. Civ. 1:99CV203.

Nov. 8, 1999.

RULING ON MOTION FOR PRELIMINARY INJUNCTION

MURTHA, Chief Judge.

I. Introduction

Recently enacted, 10 V.S.A. § 6621d(a) requires manufacturers of mercury-containing light bulbs (hereinafter also referred to as "lamps") to place certain labels on their lamps and packaging. Through this suit, the National Electrical Manufacturers Association (hereinafter "NEMA") seeks to have this Court declare Vermont's labeling requirement unconstitutional in that it violates its members' civil rights under the First Amendment, the Commerce Clause and the Supremacy Clause of the United States Constitution.

NEMA has moved for a preliminary injunction which would prohibit the defendants from enforcing § 6621d(a) and the regulations promulgated thereunder. For the reasons set

forth below, the plaintiff's Motion for Preliminary Injunction is GRANTED.[1]

II. Background

The record before the Court includes testimony presented at a hearing conducted on September 22, 23 and 24, 1999, as well as admissible evidence presented in the form of affidavits and exhibits. *See Davis v. New York City Hous. Auth.*, 166 F.3d 432, 437-38 (2d Cir.1999) ("[W]hile affidavits may be considered on a preliminary injunction motion, motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact."). Upon review of the present record and the testimony presented, the Court finds the following as relevant to the disposition of the plaintiff's Motion for Preliminary Injunction. *See* Fed.R.Civ.P. 65(a)(2) ("[A]ny evidence received upon an application for preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.")

The plaintiff, NEMA, is a trade association that includes lamp manufacturers whose lamps are sold in Vermont and nationwide. The defendants, Vermont Attorney General William Sorrell and Vermont Secretary of the Agency of Natural Resources (hereinafter "the Agency") John Kassel are responsible for administration and enforcement of the labeling statute at issue.

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[1] The instant ruling only addresses the plaintiff's claims under the Commerce Clause and First Amendment. The Court renders no opinion on any other claim encompassed in plaintiff's complaint.

The volume of testimony presented and evidence submitted reveals the parties actually dispute very little. No one disputes mercury is a toxic substance, exposure to which can result in serious impacts on human health and the environment. No one disputes that some lamps manufactured and distributed by NEMA's members contain mercury. No one disputes that certain consumers should be encouraged to use mercury-containing lamps because they are more energy-efficient than regular incandescent bulbs, thereby reducing needed energy production and the emission of pollutants into the environment. No one disputes Vermont has an interest in reducing the amount of mercury which finds its way into the environment. The only substantial dispute is whether Vermont's mercury labeling law, 10 V.S.A. § 6621d(a), furthers the goal of reducing the amount of mercury in the environment in a way that is consistent with Constitutional prohibitions against excessive state interference with a commercial entity's rights to engage in interstate commerce and free speech.

In relevant part, section 6621d(a) provides:

> Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and the retailer may not knowingly sell, any of the following items at retail if they contain mercury added during the manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in the waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler, or retailer ... Items to be labeled are: ... A lamp.

Pursuant to section 6621d(f), the Agency of Natural Resources promulgated rules and standards for labeling mercury-added products. Section 6-803(b) of the Agency's Solid Waste Management Rules ("SWMR") provides:

> (1) The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream designed for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that mercury does not become part of solid waste or wastewater.
> (2) A label must be clearly visible and legible to consumers prior to purchase of the product. The label must be located on a surface of the product that is visible during installation and removal.
> (3) For labels affixed to products, the required words or symbols must be printed, mounted, molded, or engraved on the surface of the product using materials sufficiently durable to remain legible for the useful life of the product.
> (4) For products with enclosed mercury-added switches, both the enclosed device and the larger product must be labeled.
> (5) A listed mercury-added consumer product must be labeled if manufactured after July 1, 1999 [as amended by statute, March 1, 2000].
> (6) Primary responsibility for affixing the required labels shall be on the manufacturer, and not on the wholesaler or retailer.

SWMR section 6-803(c) provides for an alternative labeling procedure:

> The Secretary may administratively authorize alternative labeling, including package labeling, for mercury-added

consumer products listed in Subsection 6-803(a)(2) above under the following conditions:
(1) A manufacturer must submit a written request for alternative labeling documenting that a product or class of products cannot reasonably be labeled to comply with specific requirements of Subsections 6-803(a) and/or (b) above.
(2) All authorizations for alternative labeling granted under this Subsection will be limited in duration and may be renewed.

The vast majority of lamps subject to Vermont's labeling requirement fall into three broad categories: (1) elongated fluorescent lamps of the type widely used in retail, residential, office and industrial locations; (2) compact fluorescent lamps, which are similar in size and use to conventional incandescent bulbs; and (3) high-intensity discharge lamps, also referred to as HID lamps, which are designed to be especially energy-efficient. Currently 11 manufacturers, most of which are NEMA members, make 4800 varieties of mercury-containing lamps for sale in Vermont.

The lamps are manufactured in a variety of places world-wide, including Europe, Asia, and South America. After manufacture, the lamps are shipped to central distribution centers which serve large regions. For example, a distribution center in Florida may supply retailers on the entire east coast. It is impossible to predict whether any particular lamps will eventually end up on a particular retailer's shelf either in Vermont or anywhere else in the United States.

Approximately 1.1 million lamps per year are sold in Vermont. This figure represents about .02% of total lamp sales in the United States.

Accordingly, it is virtually certain that any manufacturer which plans to sell lamps in Vermont will have to label all lamps it produces to comply with the labeling law. As a practical matter, it appears manufacturers will either refrain from selling mercury-containing lamps in Vermont or will have to label all bulbs manufactured world-wide with the Vermont-required label. It is apparent that labeled bulbs which find their way to jurisdictions other than Vermont will cause confusion in that they identify the product as a hazardous waste which must be recycled. However, no jurisdiction has established recycling facilities for mercury-containing lamps, a factor which may discourage potential purchasers from buying these admittedly energy-efficient bulbs.[2]

Prior to instituting this suit, NEMA and the Agency apparently engaged in unsuccessful attempts to resolve this matter. In particular, the Agency rejected NEMA's offer to meet new statutory obligations by only providing informational and warning signs for Vermont retailers to post at the point-of-purchase.

Accordingly, at this time, it appears the Agency will require manufacturers of mercury-containing lamps to permanently etch their bulbs with the symbol "Hg" in a circle, a marking which no other state or nation requires. "Hg" is the abbreviation on the periodic table for mercury. In addition, the Agency plans to require manufacturers to place on the lamp packaging an explanation that "Hg" means

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[2] Curiously, even Vermont has yet to identify its plan to recycle mercury-containing bulbs. At this time, only electric utilities in Minnesota provide recycling services.

"mercury" and the following instruction: "If Purchased in Vermont-- Don't Put in Trash--Recycle or Dispose of as Hazardous Waste."

As with other types of hazardous materials which require recycling or disposal in special facilities, the consuming public must be informed and educated as to the need for disposal of these products other than in landfills. No law requiring labeling of a hazardous substance will prove effective unless users realize the dangers associated with placing these materials in the general waste stream and are provided alternative sites for disposal by the government or private industry.

Absent an extensive education campaign, the symbol "Hg" will be meaningless to most consumers. The state, in fact, plans to undertake an extensive, yet to date poorly defined, campaign to educate consumers about mercury and the proper disposal of mercury-containing products. All marketing experts, including the defendants', stressed that any campaign directed to consumers must influence the consumer's decision at the time of disposal of the product. Yet, given the fact that there is likely a lapse of many years between lamp purchase and lamp disposal, it is unclear why an informational campaign solely geared to consumers at the time of disposal would not be equally or more effective than a labeling scheme which relies on information contained on a package which will be thrown away many years before a consumer must dispose of the lamp itself.

In addition, NEMA, through its experts, has presented credible evidence that the symbol "Hg," together with any explanatory note on the packaging, will be ignored on already cluttered bulb packaging at the time of purchase. In addition, at the end of a lamp's useful life, the symbol "Hg," without packaging that was thrown away years before, will

be rendered irrelevant.

NEMA cites a variety of problems when arguing its members cannot reasonably and economically comply with the new law and attendant regulations. Some lamps are too small to accommodate the logo the Agency requires. It is also a problem to affix a logo that lasts the life of the lamp so that the consumer can see it at the time of disposal.

Moreover, NEMA has presented evidence suggesting the cost of compliance will be substantial. To place the "Hg" logo on all lamps would require manufacturers to make millions of dollars worth of alterations to their assembly lines. The costs potentially could exceed the total revenue from lamp sales in Vermont. NEMA member General Electric, for example, estimates having to incur an initial cost of approximately $8 million to alter its production lines to affix the required labeling and produce packaging, plus annual compliance costs of an addition $4.7 million. NEMA further claims a total of 196 production lines in 60 member and non-member plants located world-wide would need to be altered to comply with Vermont's law. Finally, the costs of these changes would be passed on to consumers, possibly raising the price of already more-expensive mercury-containing lamps.

The state disputes the cost of compliance estimates tendered by NEMA's experts. At this point, the Court need not credit any particular estimate in order to find the cost of alterations to a manufacturer's production line would be substantial in that it would require manufacturers either to stop selling in Vermont, to change its distribution system to isolate bulbs going to Vermont, or to label all lamps to comply with Vermont law.

Another substantial problem with the Vermont

labeling law is that, even if the law were to operate as envisioned, it only addresses, at great cost to manufactures and increased price to consumers, a very small portion of the problem of mercury entering the environment. Power plants, especially those which burn coal, emit most of the mercury currently making its way into the environment. No coal burning plants are located in Vermont, and Vermont's labeling law will have no effect on mercury originating in other states.

At the preliminary injunction hearing, the defendants showed some manufacturers of mercury-containing lamps currently label their product as containing "low mercury" and are thus "safer for the environment." From this, they conclude: "Surely, if manufacturers can label and package lamps as low- mercury, they can also label and package them as containing mercury." Defendants' Memorandum and Affidavits in Opposition to Plaintiff's Motion for a Preliminary Injunction (paper 16) at 21. Of course, the issue is not whether NEMA members are able to label their products; the issue is, whether under the circumstances present in this case and consistent with the Constitution, the defendants can require them to label their products.

III. Discussion

A party seeking injunctive relief ordinarily must show: (a) it will suffer irreparable harm in the absence of an injunction; and (b) either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *See, e.g., Polymer Tech. Corp. v. Mimran,* 37 F.3d 74, 77-78 (2d Cir.1994); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979) (per curiam). The plaintiff has based its request for injunctive relief on a demonstration of

irreparable harm and a likelihood of success on the merits. *See* Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction (paper 3) at 23-24.

A. Irreparable Harm

It is often noted that, because monetary injury can be estimated and compensated, such injury ordinarily does not constitute irreparable harm. "However, a perhaps more accurate description of the circumstances that constitute irreparable harm is that where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the position they previously occupied." *Brenntag Int'l Chemicals, Inc. v. Bank of India,* 175 F.3d 245, 249 (2d Cir.1999). That is the case here. Even should the plaintiff ultimately prevail here, it could not recover any funds expended in complying with Vermont's mercury labeling law because the state defendants are protected by the Eleventh Amendment.

Furthermore, the Vermont labeling law impinges on the plaintiff's First Amendment rights in that it "indisputably requires them to speak when they would rather not." *International Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 72 (2d Cir.1996). Accordingly, for purposes of awarding preliminary injunctive relief in the instant case, the plaintiff has demonstrated irreparable harm. *See Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.,* 60 F.3d 27, 38 (2d Cir.1995) (irreparable harm exists where there is a threatened imminent loss that will be very difficult to quantify at trial).

B. Likelihood of Success on the Merits
1. Commerce Clause

The Commerce Clause grants to Congress the power "[t]o regulate commerce ... among the several States." U.S.

Const. art. 1, § 8. It also limits a state's power to enact statutes which establish barriers to interstate trade. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980). As the Supreme Court has explained:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted).

Here, the problem with Vermont's labeling law is that it is not narrowly-tailored, and its burdens are clearly excessive in relation to the asserted local benefits. In effect, the law requires lamp manufacturers to label all lamps, even those not destined for Vermont. Moreover, the "Hg" label itself, virtually certain to be present without explanation at the time of disposal, promises to be meaningless absent an extensive public relations campaign designed to educate the public. In this regard, the defendants have not persuasively explained why the manufacturers' offer to provide point-of-sale informational signs in retail stores which inform about proper disposal of mercury-containing lamps would not, standing alone, be equally as effective. In short, the state could meet its goal by doing away with its onerous labeling requirements and focusing on educating consumers at the time of disposal and by providing recycling facilities similar

to those already available for products such as glass and metal cans.

"Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). "[T]he practical effect of the statute must be evaluated not only considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* at 336, 109 S.Ct. 2491. By proposing a labeling scheme which essentially requires lamp manufactures to label all lamps in conformity with Vermont law, Vermont is presuming to legislate outside its own boundaries. There is only so much information which can be placed on lamps and packaging. Because of spatial limitations, any other state which may want to control the disposal of mercury- containing lamps by insisting on a different message would either have to abandon a labeling proposal or choose to be bound by Vermont's legislated message.

2. First Amendment

"Commercial speech" is entitled to protection under the First Amendment. *See Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). The First Amendment protects both the freedom to speak and the freedom not to speak. *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985).

In Commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the

> expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

Vermont also has failed to meet its burden of justifying this labeling law under the First Amendment. *See International Dairy Foods,* 92 F.3d at 72. By far, the largest source of mercury in the environment does not come from lamps. On the present record, it is little more than speculation as to whether the Vermont labeling law will be more effective than point-of-purchase signs, point-of-disposal signs, or other educational methods. *See Edenfield v. Fane,* 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Undoubtedly, the state has a substantial interest in protecting the health and safety of its citizens and environment by reducing mercury emissions. However, it may only use means that "directly advance" the asserted interest. *See Zauderer,* 471 U.S. at 638, 105 S.Ct. 2265. The problem with the labeling law at issue is its requirements are far more extensive than is necessary to advance the state's legitimate interests.

Conclusion

The Motion for a Preliminary Injunction is GRANTED. The defendants are hereby ordered to cease from attempting to enforce 10 V.S.A. § 6621d(a), and any

rules and regulations promulgated thereunder, insofar as they require the labeling of mercury-containing lamps or their packaging.

SO ORDERED.

Supreme Court, U.S.
FILED
MAY 10 2002
OFFICE OF THE CLERK

No. 01-1489

In The Supreme Court of the United States

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, and SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's dormant Commerce Clause jurisprudence, the State of Vermont may require mercury-containing products that are sold in Vermont to be labeled in a manner that informs consumers of the presence of mercury and the need for appropriate disposal?

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner has omitted relevant parts of the statutory and regulatory provisions involved in this case. Those provisions are set forth in full in the Appendix to this brief.

STATEMENT OF THE CASE

In 1998, the Vermont Legislature enacted a statute that mandates labels on products that contain mercury and are sold in Vermont. Vt. Stat. Ann. tit. 10, § 6621d (amended 1999). The labeling statute is part of a comprehensive strategy to reduce in-state sources of mercury pollution. Vt. Stat. Ann. tit. 10, §§ 6620a, 6621a, 6621b, 6621d, 6621e, 6623-6632 (1997 & Supp. 2001). Local sources are responsible for up to 60% of Vermont's mercury pollution, and mercury from spent lamps is responsible for at least 21% of Vermont's in-state mercury emissions.[1] JA 431-432.[2]

Under the statute, the label and packaging on mercury-containing products must inform consumers that the product contains mercury and, on disposal, that the product should be recycled or disposed of as hazardous

[1] NEMA claims that the use of mercury-containing lamps "results in a net reduction of the emission of pollutants (including mercury) into the environment." Pet. 4 (citing Pet. App. 26). The district court found that the use of mercury-containing lamps reduces the amount of *pollutants* released into the environment, not the amount of *mercury* released into the environment. Pet. App. 26.

[2] The notation "JA" refers to items in the parties' Joint Appendix before the court of appeals.

waste. Vt. Stat. Ann. tit. 10, § 6621d(a). The labeling requirement applies to thermostats, thermometers, switches, medical and scientific devices, electrical relays and other electrical devices, lamps, and certain batteries. *Id.* Implementing regulations allow for mutually agreeable alternatives to the labeling requirement upon a manufacturer's demonstration that it cannot reasonably comply with the labeling law.[3] Pet. App. 27-28.

Petitioner NEMA, whose members produce mercury-containing lamps, brought suit to challenge the statute under the Commerce Clause, First Amendment, Supremacy Clause and Due Process Clause of the United States Constitution. The labeling requirement has not been challenged by any other affected manufacturer.

1. The District Court Proceedings.

Respondents ("Vermont" or the "state") were served with NEMA's complaint and motion for preliminary injunction on July 27, 1999. On August 5, 1999, the district court set NEMA's motion for preliminary injunction for hearing on September 22-24, 1999. The court also ordered that Vermont's memorandum in opposition and affidavits be filed by September 14 and that exhibits be filed by September 17. Only persons who had filed affidavits could be called as witnesses.

The state called nine witnesses at the preliminary injunction hearing. The testimony addressed mercury's serious impacts on human health and the environment;

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[3] NEMA's statement of the case, Pet. 4, does not mention the possibility of alternative labeling plans.

the routes by which mercury enters the environment; using marketing theory to change consumer behavior; and Vermont's policy regarding mercury-containing lamps. NEMA does not dispute that mercury is a toxic substance, that fluorescent lamps contain mercury, or that mercury is released into the environment when mercury-containing lamps are disposed of in landfills. NEMA's own data indicated that the cost of complying with Vermont's statute was less than $0.014 per bulb. JA 159.

Vermont also filed affidavits from Steven Lindberg, Ph.D., an environmental chemist with the Oak Ridge National Laboratory, and Russell Atkinson, Ph.D., a lamp engineer and materials specialist. Drs. Lindberg and Atkinson were not available to testify at the hearing due to the short notice provided by the court. Although Vermont sought to continue the hearing to allow their testimony, the court declined to continue the hearing and excluded the affidavits from evidence. JA 333-34; JA 581-88.

The district court also took the unusual step of denying several other New England states from appearing as *amici curiae* in the preliminary injunction proceedings.[4] In so doing, the court excluded the affidavits of waste management program directors from four other New England States. The affiants uniformly stated that the Vermont mercury-labeling requirement does not conflict or interfere with their state programs. JA 138-53.

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[4] "To the extent the movant [New Hampshire representing the *amici* States] wishes to file an *amicus curiae* appearance, that motion is DENIED. The Clerk is instructed, however, to accept for filing the submitted brief so that the Court may consider it as part of the record." District Court Order 9/16/99 (paper 12).

On November 8, 1999, the district court issued a decision granting NEMA's request for a preliminary injunction. On the abbreviated factual record before it, the district court held that NEMA was likely to succeed on its First Amendment and Commerce Clause claims. The district court also concluded that manufacturers' compliance costs were sufficient to show a risk of irreparable harm, even though the court found that these costs would be passed on to consumers. Pet. App. 31.

2. The Second Circuit Proceedings.

On appeal, the Second Circuit vacated the grant of a preliminary injunction. With respect to the Commerce Clause, the court of appeals held that NEMA "cannot show likely success on the merits of its Commerce Clause claim." Pet. App. 5. Because NEMA had already conceded that Vermont's statute is nondiscriminatory, *id.*, the court proceeded with a familiar recitation of the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> In *Pike,* the Supreme Court adopted a balancing test to determine whether state statutes that incidentally burden interstate commerce violate the Commerce Clause. The Court held that
>
> > [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden

> that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.
>
> For a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.

Pet. App. 5-6 (quoting *Pike*, 397 U.S. at 142 (citations omitted)). In defining what constitutes a burden on interstate commerce, the court of appeals acknowledged the "strong tradition of judicial deference to legislative decisions" that must be overcome before a court will second-guess legislative choices. Pet. App. 7.

NEMA alleged that Vermont's mercury labeling statute burdened interstate commerce by (1) controlling commerce beyond the state's borders and (2) imposing regulatory requirements inconsistent with those of other states.[5] Pet. App. 7. The court of appeals rejected both of these claims.

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[5] NEMA asserts that the court of appeals identified only two types of disparate burdens that would trigger *Pike* analysis. In fact, the court of appeals stated that "several type of burdens on interstate commerce would qualify as 'disparate' to trigger *Pike* balancing," but found that NEMA had alleged only two types of potential burdens. Pet. App. 7. To the extent that NEMA challenged the cost of applying the label to lamps sold in Vermont as a burden on interstate commerce, the court of appeals found that NEMA's members could pass on most of their compliance costs to Vermont consumers, and that any residual compliance costs are "attributable to legitimate intrastate regulation." Pet. App. 9-10.

First, Vermont's statute does not require manufacturers to label mercury-containing products that are sold in other states. "The Vermont statute, by its terms, is 'indifferent' to whether lamps sold anywhere else in the United States are labeled or not." Pet. App. 9. If manufacturers choose to label lamps solely for the Vermont market, they can "pass much of the increased costs along to Vermont consumers in the form of higher prices." Pet. App. 9. The court acknowledged some risk that manufacturers would limit sales in Vermont due to the labeling requirement, but noted that "[w]hether the unavailability of mercury-bearing lamps in the state redounds to the benefit of state residents is a question that the political branches of the State of Vermont were entitled to decide." Pet. App. 12.

Second, Vermont's labeling requirement does not conflict with the regulatory schemes of other States. "NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach." Pet. App. 13.

Finally, the court of appeals found that Congress, through the Resource Conservation and Recovery Act, 42 U.S.C. § 6929, "expressly leaves individual states with flexibility to adopt regulations more stringent than those imposed by the federal government." Pet. App. 14. The court of appeals held that RCRA, though not a shield, offers at least a "'sturdy buffer'" against NEMA's Commerce Clause claim. *Id.* (quoting *Grocery Mfrs. of Am. v. Gerace*, 755 F.2d 993, 1005 (2d Cir. 1985)).

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the decision of the court of appeals in this case. Contrary to NEMA's assertions, no conflict over dormant Commerce Clause jurisprudence has emerged in the courts of appeals. The lower court's analysis in this case is consistent not only with the decisions of other circuits but with this Court's precedents as well. In addition, this case is not a suitable vehicle for review by this Court, both because this case is an appeal from an interlocutory order and because of the incomplete nature of the evidentiary record.

A. The decision below does not conflict with the decisions of the other courts of appeals.

Although NEMA claims that a "square[]" conflict exists among the circuits, Pet. 15, in fact not a single circuit has acknowledged a conflict in dormant Commerce Clause analysis. The cases cited by NEMA, Pet. 14-18, do not support its claim of a split among the circuits.

1. NEMA's assertion of a conflict between the Tenth Circuit and the Second Circuit is unfounded. NEMA claims that the Tenth Circuit specifically rejected the Second Circuit's definition of incidental burdens on interstate commerce in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), but a closer examination reveals no conflict. The *Dorrance* court, in its discussion of *Pike,* cites no decisions from the Second Circuit or any other circuit and does not suggest that a conflict exists. Several years after the *Dorrance* decision, the Tenth Circuit explicitly adopted the Second Circuit's statement of the *Pike* test, including its definition of incidental burdens, in *V-1 Oil*

Co. v. Utah State Dep't of Public Safety, 131 F.3d 1415 (10th Cir. 1997):

> The "incidental burdens" of the *Pike* inquiry "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *New York State Trawlers Ass'n v. Jorling,* 16 F.3d 1303, 1308 (2d Cir. 1994) (citing *Clover Leaf Creamery*, 449 U.S. at 471, 101 S. Ct. at 727). Such incidental burdens might also "include the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests." *Pacific Northwest Venison Producers v. Smitch,* 20 F.3d 1008, 1015, 1017 (9th Cir. 1994) (upholding Washington State's regulations "protecting native wildlife") (internal citations omitted).

V-1 Oil Co., 131 F.3d at 1425 (upholding Utah's licensing and certification fees on liquefied petroleum gas facilities). Having adopted the Second Circuit's reasoning on this issue, the Tenth Circuit clearly does not believe itself to be in conflict with that court.

2. Setting aside the Tenth Circuit, NEMA cites a laundry list of other cases in an attempt to buttress its argument. NEMA claims that the Fifth, Sixth and Eighth Circuits have each applied the *Pike* test to strike down nondiscriminatory statutes without requiring a showing of an incidental burden, or "disparate impact," on interstate commerce. Pet. 17-18. Again, a closer look shows that the purported conflict does not exist.

In several of the cases cited by NEMA, the courts explicitly found that the challenged statutes either

discriminated against out-of-state residents or directly regulated out-of-state transactions. *See McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 442 (6th Cir. 2000) (statute has "discriminatory effect" because "in-state dealers and remanufacturers benefit under the statute to the exclusion of out-of-state remanufacturers"); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283-84 (8th Cir. 1993) (Missouri's small loan regulatory scheme burdened out-of-state firm but not in-state firms); *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 236 (6th Cir. 1986) ("a requirement that [natural gas companies] obtain 'advance approval' from the [Michigan Public Service Commission] before issuing securities, the proceeds of which may be used to finance a project in another State, directly regulates interstate commerce"); *Serv. Machine & Shipbuilding Corp. v. Edwards,* 617 F.2d 70, 74 (5th Cir. 1980) (local ordinance "facially discriminate[s] in favor of local residents"). None of these decisions are in conflict with the Second Circuit's decision here, which deals with a nondiscriminatory statute. *See* Pet. App. 5.

The other cases relied on by NEMA are equally unhelpful to its claim. The statute considered by the Eighth Circuit in *Burlington Northern R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986), regulated the means of interstate transportation, a matter which the Second Circuit also recognized as one of special interest under the Commerce Clause. *See* Pet. App. 11-12. Similarly, the Eighth Circuit in *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000) invalidated an ordinance regulating solid waste flow, a type of regulation that this Court – and the Second Circuit – recognize as burdening interstate commerce. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994)

("While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach."); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001) ("The Supreme Court has left no doubt that flow control regulation affects interstate commerce."). Each of the cited cases, explicitly or not, found a disparate burden on interstate commerce prior to engaging in a *Pike* analysis.[6]

B. The court of appeals correctly applied this Court's precedents.

In deciding this case, the court of appeals looked to and applied this Court's Commerce Clause precedents. The court noted that a statute may violate the dormant Commerce Clause in one of two ways:

> A statute may violate the well-established "dormant" aspect of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, in one of two ways: it may clearly discriminate against interstate commerce, in which case it is virtually invalid per se, *see Wyoming v. Oklahoma,* 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), or even if it does not evince such discriminatory effect, it may still be unconstitutional if it imposes a burden on interstate commerce incommensurate with the local benefits secured, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). NEMA argues that section 6621d

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[6] In *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001), the Fifth Circuit upheld the challenged statute. As a result, this case does not support NEMA's claim that the Fifth Circuit has struck down nondiscriminatory statutes under *Pike*.

> violates the Commerce Clause in the latter manner. We disagree and thus conclude that NEMA cannot show likely success on the merits of its Commerce Clause claim.

Pet. App. 5. As this case involves no claim of discrimination, the court considered whether the statute should be invalidated under the *Pike* test. The court's decision upholding Vermont's statute is entirely consistent with this Court's precedents.

1. The court began its *Pike* analysis by evaluating whether the statute imposed an incidental burden on interstate commerce, which it defined as a "burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." Pet. App. 6. NEMA objects to the court's phrasing on this point, but the Second Circuit's opinion shows that the lower court paid careful attention to this Court's Commerce Clause precedents. Although this Court has not supplied a precise definition for the phrase "incidental burden," the Court has suggested, and the Second Circuit recognized, that state regulations burden interstate commerce when, in some manner, they "shift[] the costs of regulation to other states." Pet. App. 6-7; *see also id.* at 8-13 (discussing potential burdens on interstate commerce, such as controlling commerce occurring outside the state's borders, restricting interstate transport, or creating an actual conflict with other state regulations).

In this case NEMA argued that the statute burdened interstate commerce in two ways: (1) by controlling commerce that occurs wholly beyond Vermont's borders; and (2) by imposing regulatory requirements that risk being inconsistent with those of other states. Pet. App. 7. The court rejected both of NEMA's alleged "burdens."

First, the Court found that the statute does not regulate commerce outside of Vermont because it does not "require manufacturers to label all lamps wherever distributed." Pet. App. 9. Although manufacturers may choose to label all lamps, they could instead label only those lamps destined for Vermont, and pass on the additional cost to Vermont consumers, or they could withdraw from the Vermont market. *Id.* at 9-10. The statute may thus impose additional burdens on Vermont consumers, through higher prices or less consumer choice, but those *intrastate* burdens do not offend the Commerce Clause.[7] *Id.* at 10-12 (citing, among other cases, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978)).

Second, although the court of appeals acknowledged that a "state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states," the court found no such conflict here. Pet. App. 12-13. "NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach." *Id.* at 13.

Accordingly, having found that Vermont's statute imposed no "incidental burdens" on interstate commerce, the court declined to engage in the *Pike* balancing test, and concluded that NEMA failed to show a likelihood of success on its Commerce Clause claim.

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[7] The Second Circuit noted that this regulation does not encourage out-of-state manufacturers to leave the Vermont market, or encourage in-state manufacturers to pick up the slack. Pet. App. 11. As NEMA acknowledges, there are no in-state manufacturers who could benefit from this regulation. Pet. 22-23.

2. In its petition, NEMA does not challenge the Second Circuit's conclusions discussed above. Instead, NEMA argues that the Second Circuit was obligated to engage in *Pike* balancing even though the court found no "incidental burdens" on interstate commerce to tip the scale in NEMA's favor. This Court's decisions, however, do not support NEMA's position. Contrary to NEMA's rigid "two-tiered" analysis, this Court has acknowledged that there is "no clear line" between a facial discrimination challenge and the *Pike* test. *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997) ("several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations").[8]

Indeed, this Court has upheld state statutes against dormant Commerce Clause challenges without engaging in *Pike* balancing, even while expressly acknowledging that the challenged statutes impacted interstate commerce and interstate firms. *See, e.g., CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-92 (1987) (upholding Indiana statute governing corporate takeovers, even though impact fell primarily on out-of-state actors and statute was likely to

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[8] NEMA's claim that the *Pike* balancing test applies only to nondiscriminatory statutes is further undermined by the Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). In *Lewis*, the Court found that a Florida statute discriminated among businesses based on their contacts with the local economy. *Id.* at 42. The Court found that this "local favoritism or protectionism" was significant to the Commerce Clause analysis but nonetheless evaluated the statute under the *Pike* test: "We need not decide whether this difference is sufficient to render the Florida legislation *per se* invalid, for we are convinced that the *disparate treatment* of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." *Id.* (emphasis added).

reduce the number of hostile tender offers); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126-28 (1978) (upholding Maryland law prohibiting oil producers or refiners from operating retail service stations within the State, although law would primarily impact out-of-state firms, some of which were likely to withdraw from the Maryland market). In both cases, notwithstanding the impact on interstate commerce, the Court rejected the Commerce Clause challenges without applying or even discussing the *Pike* balancing test. The Second Circuit's resolution of this case is consistent with the Court's decisions in *CTS* and *Exxon Corp*. The lower court expressly relied on *Exxon*, *see* Pet. App. 10 n.3, 12, and rejected NEMA's implicit claim that shifting business from one interstate supplier to another constituted an impermissible burden on interstate commerce. Pet. App. 10 n.3 (citing *Exxon,* 437 U.S. at 127). As the Second Circuit found no "incidental burdens" on interstate commerce, the court correctly declined to engage in *Pike* balancing.

3. The court of appeals also adhered to this Court's direction that lower courts should not act as super legislatures under the guise of the dormant Commerce Clause. "[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981); *see also CTS*, 481 U.S. at 92 (Court will not "second guess the empirical judgment of lawmakers concerning the utility of legislation"); *Exxon*, 437 U.S. at 129 (rejecting argument that statute would change the structure of the gasoline market as "relat[ing] to the wisdom of the statute, not to its burden on commerce"). As explained in *Clover Leaf Creamery:*

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

449 U.S. at 464 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). In the absence of strong justification for judicial intervention, the court of appeals properly deferred to the policy choices made by the Vermont Legislature. Pet. App. 7.

C. This case is not well-suited for review by this Court.

As a practical matter, this case is not in an appropriate position for review by this Court, for two reasons. First, the decision in the case is not final. The court of appeals merely reversed the trial court's decision to grant a preliminary injunction. Second, contrary to NEMA's assertions, the evidentiary record is neither clear nor complete.

1. The only issue before the court of appeals in this case was the correctness of the district court's decision granting a preliminary injunction. In its decision, the court of appeals, among other things, found error in the district court's Commerce Clause analysis. Pet. App. 5-14. The court of appeals concluded that NEMA "has failed to show a likelihood of success on the merits of . . . its . . . claims," vacated the preliminary injunction, and remanded the case to the district court. Pet. App. 21. The district

court may permit additional discovery as well as other proceedings in the case before a final judgment issues.[9]

In light of the interlocutory nature of the proceedings, any decision by this Court could not finally resolve the case but would be limited to considering the grant or denial of the preliminary injunction. And even that limited issue is not fully contained with the question presented, because the court of appeals did not reach several other claims of error raised by Vermont, including Vermont's argument that NEMA cannot show a risk of irreparable harm based solely on the costs of complying with the statute.

Neither the district court nor the court of appeals has yet issued a final decision on NEMA's claims in this suit. It would be premature for the Court to accept review of the case at this stage.

2. Contrary to NEMA's assertions, there are significant problems with the evidentiary record and the findings made by the district court. First, although NEMA claims that the court of appeals "did not overturn any . . . findings of fact," Pet. 22, that is not precisely correct.[10] The court of appeals did question some of the district court's findings, expressing skepticism about the "true costs of labeling over time." Pet. App. 10 n.3. The court of appeals also

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[9] In Vermont's view, based on representations made by NEMA during the preliminary injunction proceedings, the district court should not permit further discovery by NEMA nor permit NEMA to supplement its evidence. The district court, however, has not yet even considered, much less resolved, any of these matters. All proceedings in the district court have been stayed pending this Court's decision on the Petition.

[10] The district court did not set forth specific findings of fact.

rejected the district court's finding that Vermont was "presuming to legislate outside its own boundaries," noting that in fact the statute is "indifferent" to sales outside Vermont. Pet. App. 8, 9.

Moreover, Vermont raised a number of other issues on appeal that the court of appeals did not need to reach. Vermont was unable to produce critical expert testimony at the preliminary injunction hearing, because its experts were unavailable on short notice and the district court declined to accept their affidavits or continue the hearing. The excluded evidence included testimony regarding the extent of mercury contamination caused by broken fluorescent lamps. JA 164-180 (Lindberg Aff.). The district court also excluded affidavits from officials from other New England states that showed that Vermont's labeling program did not conflict or interfere with the programs of other states.[11]

After excluding Vermont's proffered evidence, the district court then permitted an employee from General Electric to testify, on behalf of NEMA, about the compliance costs for companies other than General Electric, even though the employee had no personal knowledge of those costs. Pet. App. 31. Vermont's hearsay objections to this testimony were repeatedly overruled. JA 246, 256, 276, 278, 307-309; *see also* JA 208-216 (State's Motion to Exclude Hearsay Evidence). And finally, the district court based its Commerce Clause analysis on two hypothetical circumstances that were not supported by the record. First, the district court assumed that the required label would be the symbol for mercury, Hg, in a circle,

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[11] *See supra* note 4.

notwithstanding the statutory requirement that the label "clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream. . . . " Pet. App. 29-30; *see* 10 Vt. Stat. Ann. tit. 10, § 6621d(a) (1997 & Supp. 2001). Second, the district court inexplicably assumed that manufacturers would invest millions of dollars in creating separation production lines for lamps destined for Vermont, notwithstanding testimony by NEMA's own witness that manufacturers would undertake substantially less expensive compliance measures. Pet. App. 31.

Vermont raises these matters not to argue their merits, but merely to demonstrate the incomplete state of the evidentiary record. NEMA apparently presented its entire case at the preliminary injunction hearing, but, given the short time frame and the district court's refusal to continue the hearing or admit affidavits from unavailable witnesses, Vermont was not afforded a similar opportunity.[12] These problems with the underlying record provide further support for allowing this case to continue to final judgment in the lower courts.

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[12] Vermont agrees with the court of appeals that the statute itself, coupled with NEMA's failure to show any incidental burdens on interstate commerce, provides a sufficient basis for rejecting NEMA's dormant Commerce Clause claim. If this Court were to agree with NEMA that the statute should be subjected to *Pike* balancing, however, Vermont has not had a full opportunity to challenge the costs of compliance or to establish the benefits provided by the statute.

CONCLUSION

The petition for writ of certiorari should be denied.

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APPENDIX

Vermont Statutes Annotated, title 10, § 6621d(a), provides as follows:

> Effective March 1, 2000, a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the following items at retail if they contain mercury added during manufacture, unless the item is labeled. The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. Primary responsibility for affixing labels required under this section shall be on the manufacturer, and not on the wholesaler or retailer. By October 1, 1999, each manufacturer required to label by this section shall certify to the agency of natural resources that it has developed a labeling plan for its mercury-added products that complies with this section and any administrative labeling rule adopted by the agency of natural resources and that this labeling shall be implemented for products manufactured after March 1, 2000. The labeling plan shall include detailed descriptions of the products involved and the label size, material, content, location, and attachment method for each product and for the product packaging, where necessary under the rules, so a label is clearly visible at time of purchase. The plan must be submitted to the agency with the certification. Items to be labeled are:
>
> (1) A thermostat or thermometer.
>
> (2) A switch, individually or as part of another product.

(3) A medical or scientific instrument.

(4) An electric relay or other electrical device.

(5) A lamp.

(6) A battery, sold to the public, other than a button battery.

Section 6-803 of the Vermont Solid Waste Management Rules provides as follows:[1]

(a) To facilitate the source reduction of mercury from solid waste and to help ensure proper handling, recycling and disposal of waste mercury-added consumer products, certain mercury-added items must be labeled prior sale.

(1) After July 1, 1999,[2] a manufacturer or wholesaler may not sell at retail in this state, to a retailer in this state, or for use in this state, and a retailer may not knowingly sell, any of the items listed in 10 V.S.A. §6621d(a) at retail if they contain added mercury, unless the item is labeled in accordance with Subsections 6-803(b) or (c).

(2) Items to be labeled are:

(A) A thermostat or thermometer.

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[1] The complete text of the mercury-labeling rule is available on the Vermont Agency of Natural Resources' website at www.anr.state.vt.us/dec/wastediv/solid/websumm.htm.

[2] Amended by statute to March 1, 2000. Vermont Act No. 63 § 5 (1999), codified at Vermont Statutes Annotated, title 10, § 6621d(a).

(B) A switch, individually or as part of another product.

(C) A medical or scientific instrument.

(D) An electric relay or other electrical device.

(E) A lamp.

(F) A battery, sold to the public, other than a button battery.

(b) The following labeling standards shall apply to all mercury-added consumer products listed in Subsection 6-803(a)(2) above:

(1) The label must clearly inform the purchaser or consumer that mercury is present in the item and that the item may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that mercury does not become part of solid waste or wastewater.

(2) A label must be clearly visible and legible to consumers prior to purchase of the product. The label must be located on a surface of the product that is visible during installation and removal.

(3) For labels affixed to products, the required words or symbols must be printed, mounted, molded, or engraved on the surface of the product using materials sufficiently durable to remain legible for the useful life of the product.

(4) For products with enclosed mercury-added switches, both the enclosed device and the larger product must be labeled.

(5) A listed mercury-added consumer product must be labeled if manufactured after July 1, 1999.[3]

(6) Primary responsibility for affixing the required labels shall be on the manufacturer, and not on the wholesaler or retailer.

(c) The Secretary may administratively authorize alternative labeling, including package labeling, for mercury-added consumer products listed in Subsection 6-803(a)(2) above under the following conditions:

(1) A manufacturer must submit a written request for alternative labeling documenting that a product or class of products cannot reasonably be labeled to comply with specific requirements of Subsections 6-803(a) and/or (b) above.

(2) All authorizations for alternative labeling granted under this Subsection will be limited in duration and may be renewed.

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[3] *See supra* note 2.

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No. 01-1489

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 2002

CORPORATE DISCLOSURE STATEMENT

The National Electrical Manufacturers Association is a not for profit corporation that has neither a parent nor stockholders.

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The Petition established that certiorari is warranted because Second, Third and Seventh Circuit decisions holding that the *Pike* balancing test can only be applied to laws that have a disparate or discriminatory effect on interstate commerce conflict with Fifth, Sixth, Eighth and Tenth Circuits decisions and with this Court's repeated holding that the *Pike* test applies to nondiscriminatory laws that "regulate evenhandedly." Nothing in the State's opposition undermines the existence of this conflict on an important constitutional issue or the suitability of this case as a vehicle for resolving it.

1. Vermont does not contest what the Petition plainly demonstrates: This Court consistently has held that no discriminatory effect is required for a statute to be reviewed or held unconstitutional under the balancing test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). *See* Pet. 13-14 (collecting cases). Indeed, while Vermont quotes a footnote in *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997), for the proposition that "'several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations,'" Opp. 13, that very footnote goes on to confirm the Petition's point: "[O]ur cases have indicated that even *nondiscriminatory* state legislation may be invalid under the dormant Commerce Clause, when ... 'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'" 519 U.S. at 299 n.12 (citing cases and quoting *Pike*) (emphasis added); *see also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986)(*Pike* balancing applies to state laws that have "only *indirect* effects on interstate commerce and regulate[] *evenhandedly*")(emphasis added).

In square conflict with the law of this Court, the Second, Third and Seventh Circuits have held that proof of discrimination against interstate commerce is necessary before *Pike* balancing will even be undertaken. Pet. 14-15.

Vermont suggests that this Court's cases, although "not suppl[ying] a precise definition," have nevertheless "suggested" that an "incidental burden" within the meaning of *Pike* equates to "a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." Opp. 11. This is legerdemain.

This Court has never used the terms "incidental" or "indirect" burden to describe laws that discriminate against interstate commerce. Rather, those terms describe the impact on interstate commerce of those laws that regulate *evenhandedly* as to interstate and intrastate commerce, and therefore should be evaluated under the second-tier *Pike* balancing test, rather than under the first-tier test that applies a virtual *per se* rule against laws that discriminate against or directly regulate interstate commerce either facially or in their practical effect. As this Court has explained:

> Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more *indirect* burdens on the free flow of trade. The Court has observed that where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.... In contrast, legislation that *visits its effects equally* upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn. The Court stated in *Pike v. Bruce Church,*

> *Inc.*...: "Where the statute *regulates evenhandedly* to effectuate a legitimate local public interest, and its effects on interstate commerce are only *incidental*, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...."

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980)(emphasis added); *see also, e.g., Oregon Waste Systems, Inc. v. Dept. of Env. Quality of State of Oregon,* 511 U.S. 93, 98-99 (1994) (balancing test applies to *"nondiscriminatory* regulations that have only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (balancing test applies where "the challenged statute regulates *evenhandedly* with only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added).

Thus, under this Court's precedents, the term "incidental burden" describes the effect on interstate commerce that results from a nondiscriminatory statute that regulates interstate and intrastate commerce evenhandedly, not the converse, as Vermont contends by equating the term with that used by the Second Circuit to describe its superimposed prerequisite for *Pike* balancing—an "unequal" or "disproportionate" burden that is "qualitatively or quantitatively different from that imposed on intrastate commerce." *See* Pet. 14-15. The district court applied the correct legal standard in enjoining the Vermont labeling law based upon the extensive evidence presented during a three-day trial. [1]

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[1] Vermont's contention that mercury containing lamps constitute a significant source of environmental mercury (Opp. 1, 3) is belied by the district court's explicit finding that "[e]ven if the [Vermont labeling] law (...continued)

Vermont purports to find comfort in the fact that, out of this Court's many dormant Commerce Clause cases, two upheld statutes "without applying or even discussing the *Pike* balancing test." Opp. 14. But it is undisputed that the *Pike* balancing test *exists* and is available to a plaintiff that has properly invoked it. The issue here is the circumstance under which the balancing mandated by *Pike* and its progeny must be exercised. Cases that do not "apply[] or even discuss[]" *Pike* are not relevant to that question.[2]

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were to operate as envisioned, it only addresses, at great cost to manufacturers and increased price to consumers, *a very small portion of the problem* of mercury entering the environment." Pet. App. 31-32 (emphasis added); *see also* JA 361-62 (EPA figures show that fluorescent lamps represent half a percent of mercury releases to the environment). Similarly, Vermont's recitation of the purported availability of "mutually agreeable alternatives to the labeling requirement upon a manufacturer's demonstration that it cannot reasonably comply with the labeling law" (Opp. 2) is belied by the district court's observation that "[p]rior to instituting this suit, NEMA and [respondents] apparently engaged in unsuccessful attempts to resolve this matter," Pet. App. 29, and by the clear record establishing that no "mutually agreeable alternatives to the labeling requirements" could be reached. *See* JA 66-95 (seven pre-litigation letters between the parties over a six-month period regarding NEMA's request for, and the state's rejection of, "Lamp Manufacturers Request for an Alternative Label").

[2] In this connection, Vermont erroneously claims that "[i]n this case NEMA argued that the statute burdens interstate commerce in two ways: (1) by controlling commerce that occurs wholly beyond Vermont's borders; and (2) by imposing regulatory requirements that risk being inconsistent with those of other states." Opp. 11 (citing Second Circuit opinion below). But as NEMA clearly explained in its Petition: "In the court of appeals, NEMA had argued that these features of the Vermont labeling law provided independent grounds for invalidating the law under the Commerce Clause, separate from the *Pike* balancing test." Pet. 9 n.3. NEMA's brief in the court of appeals plainly made this distinction. Pet. C.A. Br. at iii, 45-61.

2. Vermont does not dispute that the Tenth Circuit's interpretation of *Pike* in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), is in direct conflict with that adopted by the Second, Third and Seventh Circuits. *See* Pet. 14-16. Nor does the state dispute (or even cite) the Tenth Circuit's re-affirmation of that interpretation in *Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers*, 27 F.3d 1499, 1511-12 (10th Cir. 1994). *See* Pet. 16. Vermont instead asserts that a later panel opinion in the Tenth Circuit abandoned *Dorrance*. Opp. 3-4 (citing *V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997)).

This claim cannot be reconciled with *V-1 Oil*'s explicit reaffirmation of *Dorrance* as the authoritative "appl[ication of] *Pike* principles" in the Tenth Circuit. 131 F.3d at 1424. Consistent with *Dorrance*, *V-1 Oil* specifically held that it was *not* confining its *Pike* inquiry to whether "the burdens on interstate commerce ... exceed the burdens on intrastate commerce." 131 F.3d at 1425.[3] Tenth Circuit law on this question is confirmed by that court's subsequent citation of *V-1 Oil* itself in applying *Pike* balancing to strike down a state law without requiring that the "indirect" burdens imposed by the statute on interstate commerce were "discriminatory" or otherwise "unequal" compared with the burden imposed on intrastate commerce. *See American Civil*

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[3] The court held that the relevant burdens for balancing under *Pike*, regardless of the kind or extent of the burdens placed by the challenged law on intrastate commerce, "*also include* the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests." *Id.* (emphasis added).

Liberties Union v. Johnson, 194 F.3d 1149, 1161-62 (10th Cir. 1999).[4]

The Fifth, Sixth and Eighth Circuits have also applied *Pike* to strike down statutes that lacked the discriminatory effect that the Second, Third and Seventh Circuits have deemed essential. Pet. 16-18. Cases in each circuit would have been resolved differently if the Second Circuit test had been applied. Although Vermont contends that *Service Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir.), *aff'd mem.*, 449 U.S. 913 (1980), held the ordinance at issue unconstitutional as "'facially discriminat[ing] in favor of local residents,'" Opp. 9, the Fifth Circuit in fact applied the ordinance's "savings clause [to] read out the ordinance's facial discrimination against interstate commerce," 617 F.2d at 75, and then proceeded to strike down the law's remaining portion under *Pike, id.* at 76. *See also Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 502-03 (5th Cir. 2001) (statutes that do not discriminate "either facially or in practical effect" are subject to *Pike* balancing).

Vermont implicitly concedes that the Eighth Circuit's decisions in *Burlington Northern R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986), and *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), conflict with the Second Circuit, by holding that non-discriminatory laws are to be evaluated under the *Pike* balancing test. Vermont purports to reconcile *Burlington Northern* on the ground that the Second Circuit has deemed a "regulat[ion of] the means of interstate transportation" to be "of special interest under

---

[4] The *Johnson* court held that the New Mexico law at issue was unconstitutional for other reasons as well, but its opinion makes plain that those holdings were not a prerequisite to its separate holding under the *Pike* balancing test. 194 F. 3d at 1161-62.

the Commerce Clause," and *U & I Sanitation* on the ground that waste flow control laws can burden interstate commerce. But these observations, even if accurate,[5] would be relevant only if the *Eighth Circuit* had based its decisions upon that reasoning. It did not.

Moreover, the Eighth Circuit's decision in *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280 (8th Cir. 1993), did not turn, as Vermont claims (Opp. 9), on whether in-state firms were burdened by the challenged law to the same extent as out-of-state firms. Rather, the Eighth Circuit, in a straightforward application of the *Pike* balancing test, struck down the admittedly non-discriminatory law because "the burden Missouri's small loan laws would place on interstate commerce when applied to Pioneer's operation [lending to non-state-residents living on a federal military base] is great compared to the relatively slight local interests served by imposition of its regulatory scheme to Pioneer's loans to non-residents stationed at [the base]." 2 F. 3d at 285.

Although Vermont suggests (Opp. 9) that the Sixth Circuit struck down as a ""direct regulat[ion of] interstate commerce"" the Michigan law at issue in *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd on other grounds*, 485 U.S. 293 (1988), the Sixth Circuit's opinion explained that the court was "proceed[ing] to the second tier [under] *Pike*" and it struck down a nondiscriminatory law because "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in

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[5] No "special" or particular dormant Commerce Clause analysis is applicable in transportation or solid waste cases; standard dormant Commerce Clause analysis applies in both types of cases. *See, e.g., Raymond Motor Transport v. Rice*, 434 U.S. 429 (1978); *Oregon Waste Systems, supra.*

protecting consumers and investors." 801 F.2d at 238. Moreover, the Petition's citation to *McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000)(Pet. 17), made clear that the Sixth Circuit application of *Pike* there was an alternative holding, but one quite relevant here, given that court's conclusion that "[e]ven if the statute [were] *not* so obviously discriminatory ... we would still find that the burden it imposes is clearly excessive in relation to the putative local benefits." *Id. at* 444 (emphasis added).

The conflict among the circuits on this critical Commerce Clause question cannot be gainsaid.

3. This case is a suitable vehicle for resolving the important legal issue presented by this Petition. The court of appeals plainly ruled, as a matter of law, on the purported deficiencies of NEMA's claim arising under *Pike*. No factual or legal issue remains to be developed in the lower courts concerning the question presented. Vermont does not identify any way in which the Commerce Clause issue raised by the case in its current posture would be better presented were review by this Court postponed. That issue is an important and recurring one (*see* Pet. 21-22), and as the amicus brief of the Electronic Industries Alliance and National Association of Manufacturers demonstrates, of great practical importance. The Court should take this opportunity to resolve it.

Vermont half-heartedly contends that the Petition is "not precisely correct" in observing that the court of appeals "did not overturn any [of the district court's] findings of fact." Opp. 16. Vermont observes that the Second Circuit "question[ed] some of the district court's findings, expressing skepticism about the 'true costs of labeling over time.'" Opp. 16. But "questioning" or "expressing

skepticism" in no way equates with overturning a factual finding as "clearly erroneous," which would have required an appellate court determination based "on the entire evidence" that it is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

The Second Circuit made no such determination because it reversed the district court's application of the *Pike* balancing test based solely upon its erection of a "disparate burden" prerequisite to the judicial exercise of *Pike* balancing. The correctness of that ruling of law is squarely presented for this Court's consideration.

Finally, Vermont recites several evidentiary rulings by the district court with which it disagrees. Opp. 17-18. But as the State concedes, the Second Circuit did not reach any of these issues, Opp. 17, which were committed to the district court's sound discretion and thus would be highly unlikely to be reversed by a court of appeals. None of these alleged evidentiary errors presents a certworthy issue or an obstacle to this Court's resolution of the question presented by the Petition. [6]

---

[6] Although Vermont claims that several states were precluded from filing an amicus brief (Opp. 3), the district court in fact accepted that brief for filing, and only foreclosed these non-parties' improper effort to submit factual affidavits by persons who neither intended to appear as witnesses nor otherwise be subject to cross-examination (*see* Opp. 3 n.4). Furthermore, the district court quite properly declined to rely on the affidavits of two Vermont witnesses who neither attended the trial nor appeared by deposition. (*see* Opp. 3).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MISCELLANEOUS

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IN THE

Supreme Court of the United States

No. 01-1489

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT, SCOTT JOHNSTONE, AS SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE ELECTRONIC INDUSTRIES ALLIANCE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Electronic Industries Alliance ("EIA") and the National Association of Manufacturers ("NAM") respectfully submit this brief as *amici curiae* in support of the petition.[1]

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part

The Electronic Industries Alliance (EIA) is an alliance of six electronic and high technology associations. These associations include the Consumer Electronics Association (CEA), the Telecommunications Industry Association (TIA), the Government Electronics and Information Technology Association (GEIA), the Electronic Components, Assemblies and Materials Association (ECA), JEDEC—the leading developer of standards for the semiconductor industry, and the Electronic Industries Foundation, which is the philanthropic partner of EIA. Together, these associations form the premier high tech association in the world. The Alliance's mission is to promote the market development and competitiveness of the U.S. high tech industry through domestic and international policy efforts. EIA is comprised of more than 2,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. Typical products manufactured by EIA members include consumer electronics such as televisions, computers, printers, and cameras; office equipment such as printers, copiers, and network servers; telecommunication equipment, such as cell phones and satellites; and military devices such as defense equipment.

The National Association of Manufacturers ("NAM")—"18 million people who make things in America"—is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in 50

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and no person or entity, other than amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

states. NAM members produce goods in every industrial sector.

Both EIA and the NAM filed an amici curiae brief in support of Petitioner's petition for rehearing and suggestion for rehearing en banc in the court below.

The common thread that unites the *amici* is their serious concern regarding the impact of the Second Circuit's decision on the functioning of the distribution process for manufactured goods. By holding that state labeling requirements are immune from Commerce Clause scrutiny, so long as the same requirements apply to goods manufactured within the State and those manufactured outside the State, the court below has opened the door to onerous—and conflicting—state regulations that threaten to undermine the national marketplace on which manufacturers depend.

American manufacturers today produce and package their goods in plants all over the country (and indeed all over the world), with no differentiation based on the State in which a particular item will ultimately be sold. Those goods are typically moved to intermediate distribution centers, from which they are transferred to other wholesale or retail outlets throughout a multi-state area in response to demand for the product. Even at the retail level, nationwide chains often transfer goods from a retail outlet in one State to an outlet in another State in response to differences in local demand for a particular product.

Under the decision of the Second Circuit, any individual State can impose detailed labeling requirements on a particular product sold in that State, as long as it imposes the same requirement on goods produced within the State and those produced outside the State—and the court will not even consider the extent to which the labeling requirement burdens interstate commerce or whether the goals of the statute could

be met by less burdensome means. This holding opens the door to a kaleidoscope of varying (and potentially conflicting) labeling requirements, as individual state legislatures form their own judgment as to what label best advances the interests of their local citizens. But in many instances businesses will be unable to comply with such a patchwork of labeling requirements without a significant (and expensive) disruption of their production and distribution systems.

Moreover, the potential impact on the members of EIA and the NAM go far beyond state labeling laws. State and local governments enact a wide variety of laws and ordinances with which businesses must comply. Under the rationale of the Second Circuit, those laws are wholly immune from challenge under the Commerce Clause, as long as there is no discrimination between out-of-state and in-state companies—even if there are in fact no in-state companies to be affected. The potential for burdensome and disruptive state regulation, for which the members of EIA and the NAM have no recourse whatsoever, is enormous.

SUMMARY OF ARGUMENT

The unfettered freedom of states to impose state-specific labeling or packaging requirements, immune from Commerce Clause review, threatens a significant (and expensive) disruption to the production and distribution processes of manufacturers all over the world. Because of the complex distribution network through which goods typically move on their way to market, a manufacturer often has no way to ascertain at the time of production where any particular goods may ultimately be sold. To comply with state-by-state laws, such a manufacturer generally has only two options—a retooling of facilities to set up special production and distribution lines for goods destined for specific states; or the inclusion on all products, wherever

sold, of the labels required by every individual state. Both options can be highly disruptive to the efficiency of the interstate marketplace, and also add significantly to the costs of production—costs that would eventually translate into higher prices for the consumer. Moreover, placing numerous labels on a product will not always be feasible given the small size of many products.

The Second Circuit's refusal *even to consider* the burdens caused by such a law on interstate commerce unless the law discriminates between in-state and out-of-state manufacturers cannot be squared with this Court's settled Commerce Clause jurisprudence. Indeed, by its terms the *Pike* test, which requires that the burdens on interstate commerce be balanced against the claimed local benefits, comes into play only when the law at issue "regulates even-handedly" and does not discriminate against interstate commerce.

The nationwide "free market" guaranteed by the Commerce Clause is the bedrock on which this country's manufacturing industry has been able to grow and prosper. That free market is threatened by the crabbed interpretation of the Commerce Clause adopted by the Second Circuit and the other circuits identified in the Petition. By precluding any Commerce Clause challenge to state regulations, no matter how burdensome and disruptive of interstate businesses, unless the state law overtly discriminates between out-of-state and in-state businesses, the Second Circuit has opened the door to a Balkanization of regulatory requirements that jeopardize the efficient functioning of the interstate marketplace that our Constitution was designed to ensure.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION, IF NOT PROMPTLY OVERTURNED, WILL RESULT IN MAJOR DISRUPTION TO THE DISTRIBUTION OF MANUFACTURED GOODS

The Second Circuit candidly admits that the effect of its decision may well be to require manufacturers "to modify their production and distribution systems to differentiate between Vermont-based and non-Vermont based lamps." Pet. App. 9. It brushes aside this impact, however, blithely suggesting that any problem is simply the result of the "unwilling[ness]" of manufacturers to change their systems (*id.*), and that the solution is simply for lamp manufacturers to "arrange their production and distribution processes to produce labeled lamps solely for the Vermont market." (*Id.*) This simplistic suggestion wholly ignores the significant disruption that such a "modification" would cause to modern distribution systems, and the resulting impact on the efficient functioning of the interstate market.

The days when goods were produced in small plants and transferred directly to local markets have long since ended. Modern transportation and communications systems have given rise to complex, but highly efficient, business models that permit factories and distribution centers to be located at whatever point is most advantageous for business purposes, while still providing customers with prompt delivery of products as they are needed.[2] In today's economy, factories may be located anywhere in the country (or, in many instances, anywhere in the world). Siting decisions are not based on the anticipated point at which the goods will be sold, but rather on such factors as tax advantages, the

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[2] Modern distribution practices are described in some depth in *The Management of Business Logistics* (6th ed. 1996), by John J. Coyle, Edward J. Bardi and C. John Langley, Jr.

availability of a skilled work force, proximity to raw materials, availability and cost of reliable energy sources, availability and cost of transportation, and stability of political systems. The finished goods are typically packaged at the manufacturing plant or transferred to a separate packaging center. In some instances products that bear a seller's name and logo are not manufactured directly by the seller, so the seller may never touch or see the finished goods or their packaging before they are placed into interstate channels of distribution.

Once produced and packaged, products normally go through a number of intermediate distribution stations on their way to the ultimate retail outlet. Typically a large manufacturer will operate several of its own distribution centers, strategically situated to serve a wide multi-state area, which may handle a variety of goods produced by that manufacturer. Products are shipped by those distribution centers in response to orders from wholesalers or distribution centers of major retailers, many of which also serve a multi-state area. The final shipment to the individual retail outlet or commercial customer typically occurs when an order is received by the wholesaler or the retail distributor.[3]

The "unwilling[ness]" of the manufacturers of the mercury-containing lamps involved in this case to "modify" their processes so as to produce and distribute lamps solely for the Vermont market thus was not simply a matter of intransigence, or a reluctance to make relatively minor changes in their current practices. It was rather a reflection

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[3] The distribution processes for the principal manufacturers of mercury-containing lamps, including General Electric, Philips and Sylvania, were described in detail by the witness for Petitioner NEMA at the trial in this case. *See* JA 000020-26, 000249-267, 000304, 000617-621. Citations with the notation "JA" refer to items in the parties' Joint Appendix before the court of appeals.

of the fundamental fact that such a "modification" would be extraordinarily disruptive of their manufacturing and distribution systems, and would result in costs far higher than justified by the size of the small Vermont market. Indeed, petitioners estimated that the one-time cost of setting up a separate production and distribution line solely for lamps to be sold in Vermont would be over $8 million for General Electric alone, plus added annual costs of over $4.7 million.[4] For the entire industry, petitioners estimated a one-time conversion cost of over $13 million, plus recurring annual costs of over $16 million.[5] And these are simply the out-of-pocket costs. They do not even take into account the loss of efficiency to the overall manufacturing and distribution processes or the disruption to their operations, both of which have a major impact on their interstate businesses as a whole.[6]

Other members of EIA and the NAM have equally complex distribution systems, and would face equally severe dislocations if those systems had to be modified to accommodate state-specific labeling requirements.

For example, at least two EIA member companies are global manufacturers of consumer electronic products, such as televisions and audio equipment. These companies have numerous manufacturing facilities around the world. The manufacturing facilities are generally product-specific, rather than market-specific. Thus, a company may manufacture a particular type of product, such as televisions, in a facility in Mexico for global distribution. For the U.S. market, the

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[4] *See* JA 000296.

[5] *See* JA 000297- 000298.

[6] The same witness testified that if the manufacturers were instead to modify their production so as to affix the Vermont-required label to all of their mercury-containing lamps, the cost to the industry would be over $9 million. *See* JA 000280.

products are generally shipped from the manufacturing facilities to the companies' warehouses located throughout the United States. Products are often then shipped from the manufacturer's warehouse to distributor or customer warehouses, which in turn often serve several states. Thus, when a product leaves the manufacturer's warehouse, the manufacturer, and the customer itself, have no way of knowing where the product will ultimately be sold.[7]

The problems are not limited to manufacturers of consumer goods. For example, one of EIA's member companies is a large aerospace electronics manufacturer that has manufacturing facilities in four different states, and numerous service facilities throughout the United States. The company manufactures and packages its products at its four plants for nationwide sales, without any differentiation as to where the products might ultimately be sold. The products are either shipped directly to corporate customers, such as airline manufacturers, which may install the product in an aircraft located anywhere in the country, or to the company's own service centers, which generally serve a multi-state area. Thus, the manufacturer has no way of knowing at the time of manufacture and packaging where any individual electronic device will ultimately be sold or used.

If the Second Circuit decision is allowed to stand, there can be little doubt that other states, both in that Circuit and elsewhere, will view it as a "green light" to pursue labeling requirements that address their own preferred causes and

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[7] In addition, some customers may order particular products directly from the manufacturer's overseas manufacturing plant, and the customer may then import the products into the United States itself. In such cases, the manufacturer may not even know that the products are destined for the United States, much less the particular State in which they will ultimately be sold.

concerns. Indeed, Rhode Island and Maine have already enacted laws that require state-specific labeling of mercury-containing products.[8] In addition, several other states are currently considering similar labeling legislation. For example, Connecticut and Massachusetts are considering legislation that would require labeling of mercury-containing products and their packaging.[9] Similarly, California is considering legislation that would require all cathode ray tubes or devices, and the packaging containing such tubes or devices, to include a label approved by the State Department of Toxic Substances Control.[10] There is no assurance that the requirements imposed by one State will be consistent with those of other states.

In these circumstances, it is apparent that the Vermont labeling law is not simply an aberration. Unless this Court acts promptly to review the Second Circuit's decision, similar laws are clearly going to proliferate in other states. This will create major manufacturing and distribution problems for businesses—and yet those businesses will have no recourse to the Courts for review under the Commerce Clause unless the laws overtly discriminate between in-state and out-of-state businesses.

Current manufacturing and distribution systems have developed so as to take advantage of advances in technology, transportation and communications. When states enact laws that would require a major disruption in those systems, businesses should be entitled to a review of the constitutionality of such laws in which the burdens imposed on interstate commerce are weighed against the claimed local

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[8] 2001 R.I. Pub. Laws 318, R.I. Gen. Laws § 23 ch. 24.9; Me. Rev. Stat. Ann. tit. 38, § 1662 (2001).

[9] *See* Raised H.B. 5539, 2002 Gen. Assem., Feb. Sess. (Conn. 2002); House No. 4717, 2001 House of Representatives (Mass. Nov. 5, 2001).

[10] S.B. 1619, 2001-2002 Reg. Sess. (Cal. Feb. 21, 2002).

benefits, and the availability of less burdensome means of achieving the state's goals are taken into account. Those rights are denied by the Second Circuit's decision, to the serious detriment of American business and, ultimately, the consumers throughout the nation that they serve.

II. THE SECOND CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE PROTECTION AFFORDED AMERICAN BUSINESS BY THE COMMERCE CLAUSE

From the perspective of American manufacturers, the Commerce Clause is one of the most important provisions of the U.S. Constitution.[11] It provides the assurance that goods, once produced, can be freely marketed throughout the United States, free from State and local laws that create excessive burdens on the interstate marketplace.

This Court's Commerce Clause jurisprudence has recognized that, to achieve its purpose, the protections of the Commerce Clause cannot be limited to the invalidation of state or local laws that discriminate between interstate and in-state businesses. Disruptions of the free interstate market can result just as surely from state and local laws that, while

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[11] The importance of the Commerce Clause cannot be overstated. Indeed, the concerns that underlay the Commerce Clause are among the principal reasons why the Constitution came into being. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States; to examine the relative situations and trade of the said States [and] to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony. . . ." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) (quotation and citation omitted); *see also* Joseph Story, *Commentaries on the Constitution of the United States* § 507 (1833) ("The want of [federal] power [to regulate commerce] was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution.").

falling equally on both out-of-state and in-state businesses, nevertheless place burdens on interstate commerce that are enormous in relation to the local benefit sought to be served. Thus over fifty years ago, this Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), invalidated a state law regulating the length of trains, not because of any discrimination against interstate commerce, but because the law "impose[d] a serious burden on the interstate commerce conducted by" the railroads by "delaying it and by substantially increasing its cost and impairing its efficiency." *Id.* at 773, 779. Some fifteen years later, a state's effort to require a particular type of "mud flap" on trucks operated within the State was invalidated, even though there was no "element of discrimination against interstate commerce," because of the "great burden of delay and inconvenience on those interstate motor carriers" entering the State. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525, 528-29 (1959). This "second tier" of Commerce Clause analysis was clearly articulated in this Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) ("*Pike*"), which stated the now-familiar principle that, "[even where a state or local] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it may still be unconstitutional in violation of the Commerce Clause if "the burden imposed on . . . [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

Application of the *Pike* text has been of crucial importance to the effective functioning of the interstate market-place. *See, e.g., Catto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995) (Minnesota statute prohibiting sale of petroleum-based sweeping products not discriminatory but burdens on interstate commerce must be weighed against "miniscule" public benefits of statute); *Lewis Bros. Co. v. Maurer*, 712 F. Supp. 645, 653 (S.D. Ohio 1989) (Ohio statute prohibiting use of word "butter" in package label

"applies evenhandedly to both in-state and out-of-state producers" but is nevertheless unconstitutional because local interests can be served by less restrictive measures); *Wallace v. Town of Palm Beach*, 624 F. Supp. 864, 870 (S.D. Fla. 1984) (local ordinance requiring employee identification cards is evenhanded "on its face" but nevertheless violates Commerce Clause because burden on interstate commerce is excessive in relation to legitimate local interests), *appeal dismissed*, 809 F.2d 1525 (11th Cir. 1987).

In all of those cases, the problem was not one of discrimination between interstate and intrastate businesses. Indeed, the courts in those cases found that there was in fact no discrimination. The problem was the *impact* of the laws on interstate commerce—which was no less serious simply because the laws applied to out-of-state and in-state businesses alike.

The law at issue in this case is a classic example of a law that places enormous burdens on interstate commerce. As described above, the mercury-containing products regulated under the Vermont labeling law are mass-produced in plants throughout the world, and are then generally shipped to central distribution centers that serve large regions of the United States. Because manufacturers do not ship these products directly to retailers, or to state-specific distribution centers, a manufacturer cannot predict whether any particular product will eventually end up in Vermont. Therefore, manufacturers do not have the option of simply labeling a particular batch of products intended for the Vermont market. And the cost of developing and implementing a separate production line and distribution system only for Vermont products, as the Second Circuit suggests should be done, would be prohibitive given the relatively small size of the Vermont market. *See* p. 7-8, *supra*. Moreover, as more states enact their own brand of labeling laws, each with different

requirements as to content and placement, these costs will rise exponentially.

The only practical alternative—to label all mercury-containing products, no matter where they may be sold, according to Vermont's requirements—would likely be cost-prohibitive. Billions of such products are manufactured and sold worldwide each year, and the costs of re-tooling production equipment to add a product and package label to each would be extremely high. *See* p. 8, *supra*. Moreover, this option would be feasible only so long as other states did not impose laws requiring different wording on the label of products sold or used in that State.

By any reasonable standard, these are serious burdens that are being imposed on the interstate commerce in mercury-containing lamps. Yet the Second Circuit refused *even to consider* whether those burdens are excessive in relation to the asserted local benefit—i.e., the education of consumers as to the proper disposal of such lamps—and whether those benefits could be achieved through less burdensome means (such as point-of-sale signs in retail stores).[12]

The Vermont labeling law is precisely the type of statute that should have been subjected to rigorous scrutiny under the *Pike* balancing test, weighing the burdens imposed on

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[12] Indeed, it appears that even if the Vermont statute were successful in educating consumers to dispose of mercury lamps as hazardous waste, rather than in the regular municipal waste stream, that would have little impact on the release of mercury into the environment. According to the U.S. Environmental Protection Agency's 1997 Mercury Study Report, available at *http://www.epa.gov/oar/mercury.html*, the major contributors of mercury emissions are utility, commercial and residential boilers. Landfills, where most municipal waste is disposed of, are insignificant sources of mercury emissions into the environment.

interstate commerce against the local benefits and evaluating the existence of less burdensome means of achieving the State's objectives. To the extent that the Second Circuit (and other Circuits that follow the same rationale) refuses to engage in this type of analysis in the absence of a showing of discrimination, it is depriving American business of a substantial measure of the Constitutional protection that they are entitled to receive under this Court's dormant Commerce Clause jurisprudence.

CONCLUSION

The petition for certiorari should be granted and the Second Circuit's decision should be reversed.

Respectfully submitted,

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